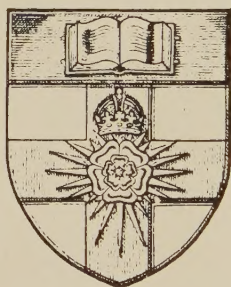


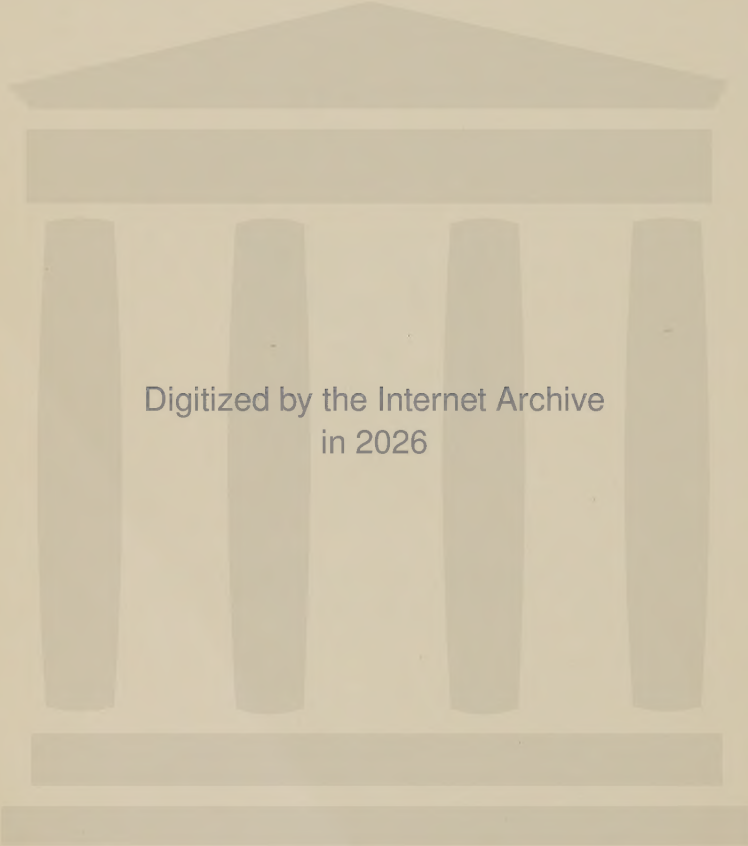
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- Rex v. Woking Justices. Ex parte Johnstone*
[1942] 2 K. B. 248.
Distinguished. REX v. DUNNE. *Ex parte SINNATT* - **Divl. Ct. 516**
- Richards v. Goskar* - [1937] A. C. 304
Principle laid down by Lord Atkin
applied. WALDEN v. MONO CON-
CRETE CO. - **C. A. 683**
- Robinson v. Stern* [1939] 2 K. B. 260
Statement by Goddard L.J., at
p. 269, applied. HOLLINGTON v.
F. HEWTHORNE & CO., LD.
Hilbery J. 27
- Distinguished. HOLLINGTON v. F.
HEWTHORN & CO. - **C. A. 587**
- Roths (Countess) v. Kirkcaldy Waterworks Commissioners* (1882) 7 App. Cas. 694.
Observations of Lord Watson, at
p. 707, applied. J. & J. MAKIN, LD.
v. L.N.E. RY. - **C. A. 467**
- Rylands v. Fletcher* (1868) L. R. 3 H. L. 330
Doctrine not applied. PETERS v.
PRINCE OF WALES THEATRE (BIR-
MINGHAM), LD. - **C. A. 73**
- Sedleigh-Denfield v. O'Callaghan* [1940] A. C. 880.
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p. 913, applied. LEANSE v.
EGERTON
Viscount Caldecote C.J. 323
- Skilton v. Epsom & Ewell U.D.C.* [1937] 1 K. B. 112.
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C. A. 188
- Stevenson v. Watson* (1879) 4 C. P. D. 148.
Applied. FINNEGAN v. ALLEN
C. A. 425
- Taylor v. Hamstead Colliery Co.* [1904] 1 K. B. 838.
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L.N.E. RY. - **C. A. 531**
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C. A. 425
- Tilleard, In re* - (1863) 32 Beav. 476
Not good law. *In re TAXATION OF COSTS* - **C. A. 69**
- White v. Hindley Local Board of Health*
(1875) L. R. 10 Q. B. 219.
Principle enunciated by Blackburn
J., at p. 223, applied. SIMON v.
ISLINGTON B. C. - **C. A. 188**
- Wilson's and Clyde Coal Co. v. English* [1938] A. C. 57.
Applied. SPEED v. THOMAS SWIFT
& CO. - **C. A. 557**
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followed. WALDEN v. MONO CON-
CRETE CO. - **C. A. 683**

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- Butter (Maximum Prices) (No. 2) Order*, 1940 (St. R. & O., 1940, No. 773), sch. (as amended by St. R. & O., 1941, No. 666, art. 1 (c)). **CHARMAN v. THOMAS** - Divl. Ct. 13
- County Court Rules*, 1936-1941, Or. XV., r. 6 **PRUDENTIAL ASSURANCE CO. v. REVILLE, LD.** - C. A. 448
- Defence (General) Regulations*, 1939 (St. R. & O., 1939, No. 927), reg. 18B (1A). **BUDD v. ANDERSON**
Asquith J. 642
- — — reg. 24 (2B). **MEADOW DAIRY CO. v. COTTLE** - Divl. Ct. 199
- — — reg. 47A (1) (b), (6). **ROBINSON v. ROBSON** - Divl. Ct. 401
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- Electricity: Regulations for the Generation, etc., of Electrical Energy in Premises under the Factory & Workshops Acts*, 1901 and 1907 (St. R. & O., 1908, No. 1312), exemption 4. **PROCTOR v. JOHNSON & PHILLIPS, LD.**
C. A. 553
- Essential Work (General Provisions) Order*, 1941 (St. R. & O., 1941, No. 302), art. 5 (3). **DOCKER v. STANDARD TELEPHONES AND CABLES, LD.**
C. A. 92
- Essential Work (General Provisions) Order*, 1942 (St. R. & O., 1942, No. 371), art. 5 (3). **HODGE v. ULTRA ELECTRIC, LD.** - Divl. Ct. 462
- — — art. 6A (2), (4). **CONWAY v. STOCKS** - Divl. Ct. 438
- Essential Work (General Provisions) (Amendment) Order*, 1942 (St. R. & O., 1942, No. 583), art. 3. **CONWAY v. STOCKS** - Divl. Ct. 438
- Lighting (Restrictions) Order*, 1940 (St. R. & O., 1940, No. 74), paras. 1 (a), 52 (4). **MEADOW DAIRY CO. v. COTTLE**
Divl. Ct. 199
- — — para. 31 (1). **BLACKSHAW v. CHAMBERS** - Divl. Ct. 44
- National Health Insurance (Subsidiary Employments) Order*, 1932 (St. R. & O., 1932, No. 501), sch. I., part III. *In re* **MACKLEY**
Singleton J. 325
- Pedestrian Crossing Places (Traffic) Provisional Regulations*, 1935, regs. 3, 4. **SPARKS v. EDWARD ASH, LD.**
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- Pedestrian Crossing Places (Traffic) Regulations*, 1941 (St. R. & O., 1941, No. 397), regs. 3, 4. **SPARKS v. EDWARD ASH, LD.** - C. A. 223
- Prison Rules*, 1933 (St. R. & O., 1933, No. 809). **ARBON v. ANDERSON. DE LAESSOE v. SAME** **Goddard L.J. 252**
- R. S. C., Or. XIX., r. 22.* **BURGESS v. BEETHOVEN ELECTRIC EQUIPMENT, LD.** - C. A. 96
- — — Or. XXII., r. 1, sub-r. 3. **DAVIES v. RUSTPROOF METAL WINDOW CO.**
C. A. 299
- — — Or. XLII., r. 32. **FAGOT v. GACHES**
C. A. 10
- Railway: Standard Terms and Conditions of Carriage*, 1927 (St. R. & O., 1927, No. 1009), *Owner's Risk Conditions*, 3, 9. **HARTSTOKE FRUITERS, LD. v. L. M. & S. RY.** - C. A. 362
- Shipbuilding Regulations*, 1931 (St. R. & O., 1931, No. 133), regs. 1, 10, 42. **GARCIA v. HARLAND & WOLFF**
Atkinson J. 731
- Solicitors' Remuneration (Gross Sum) Order*, 1934 (St. R. & O., 1934, No. 548), para. 1. *In re* **TAXATION OF COSTS**
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- Summary Jurisdiction Rules*, 1915 (St. R. & O., 1915, No. 200/L.12), r. 52. **GREGORY v. CATTLE** **Divl. Ct. 412**
- Woodworking Machinery Regulations*, 1922 (St. R. & O., 1922, No. 1196), regs. 10, 21. **WHITTEN v. ARMY AND NAVY STORES** - **Wrottesley J. 580**

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1794.

Peak Forest Canal (34 Geo. 3, c. XXVI.),
s. 15. J. & J. MAKIN, LD. v.
L.N.E. RY. - - - **C. A. 467**

1827.

Criminal Law (7 & 8 Geo. 4, c. 28), s. 10
REX v. GREENBERG **C. C. A. 381**

1838.

Small Tenements Recovery (1 & 2 Vict.
c. 74), s. 3. REX v. DROXFORD
JUSTICES. *Ex parte* KNIGHT
Divl. Ct. 284

1839.

Metropolitan Police Courts (2 & 3 Vict. c. 71),
s. 50. COCKHILL v. DAVIES
Divl. Ct. 508

1845.

Railway Clauses Consolidation (8 & 9 Vict.
c. 20), s. 68. KNIGHT v. GREAT
WESTERN RY. CO. - **Tucker J. 105**

1854.

Gaming Houses (17 & 18 Vict. c. 38), s. 4.
REX v. TOMPSON - **C. C. A. 650**

1857.

Summary Jurisdiction (20 & 21 Vict. c. 43),
s. 2. GREGORY v. CATTLE
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1867.

War Department Stores (30 & 31 Vict.
c. 128), s. 20. MINISTER OF SUPPLY
v. BRITISH THOMSON-HOUSTON CO.
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1879.

Nelson Local Board (42 & 43 Vict.
c. lxxxix.), s. 21. BANK VIEW
MILLS, LD. v. NELSON CORPORATION
C. A. 337

Summary Jurisdiction (42 & 43 Vict. c. 49),
s. 9, sub-s. 1. COCKHILL v. DAVIES
Divl. Ct. 508

— — — s. 33, sub-s. 2. GREGORY v.
CATTLE - - - **Divl. Ct. 412**

1889.

Customs and Inland Revenue (52 Vict. c. 7),
s. 11, sub-s. 1. ATTORNEY-GENERAL
v. BARCLAYS BANK - **C. A. 721**

1891.

Stamp (54 & 55 Vict. c. 39), s. 54; sch. I.
G. H. R. CO. v. INLAND REVENUE
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1894.

Finance (57 & 58 Vict. c. 30), s. 2, sub-s. 1
(c). ATTORNEY-GENERAL v. BAR-
CLAYS BANK - - - **C. A. 721**

Merchant Shipping (57 & 58 Vict. c. 60),
s. 114, sub-s. 2. LEWIS v. MOGAN
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— — — s. 228 (b); s. 239, sub-s. 6;
s. 695, sub-s. 1. ROBINSON v.
ROBSON - - - **Divl. Ct. 401**

1897-1925.

Workmen's Compensation Acts. LEIVERS
v. BARBER, WALKER & CO., LD.
C. A. 385

1907-1939.

Patents & Designs Acts, s. 29, sub-s. 1.
NO-NAIL CASES PROPRIETARY, LD.
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Atkinson J. 633

1911.

Coal Mines (1 & 2 Geo. 5, c. 50), s. 104.
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REX v. HOOD-BARRS - **C. C. A. 455**

1914.

Criminal Justice Administration (4 & 5
Geo. 5, c. 58), s. 37, sub-s. 1.
WALKER v. HEMMANT **Divl. Ct. 604**

1916.

Prevention of Corruption (6 & 7 Geo. 5,
c. 64), s. 2. REX v. CARR-BRIANT
C. C. A. 607

1918.

Income Tax (8 & 9 Geo. 5, c. 40), s. 137,
sub-s. 4; s. 230, sub-s. 2. REX v.
HOOD-BARRS - **C. C. A. 455**

— — — sch. A, No. VIII., rr. 4, 7, 9.
THORLEY v. PAYNE **Tucker J. 306**

— — — sch. D, case III., r. 1 (b),
cases IV., V. LOMAX v. PETER
DIXON & SON - - - **C. A. 671**

1920.

Increase of Rent and Mortgage Interest
(Restrictions) (10 & 11 Geo. 5,
c. 17), s. 1. GRIFFITHS v. DAVIES
C. A. 618

— — — s. 12, sub-s. 1 (a). DAVIES v.
WARWICK - - - **C. A. 329**

1920-1939.

Rent and Mortgage Interest Restrictions Acts. GLOUCESTER (BISHOP) *v.* CUNNINGTON - **C. A. 101**

1923.

Rent and Mortgage Interest Restrictions (13 & 14 Geo. 5, c. 32), s. 11, sub-s. 1. GRIFFITHS *v.* DAVIES
C. A. 618

1925.

Administration of Estates (15 Geo. 5, c. 23), s. 36, sub-ss. 1, 11. G. H. R. CO. *v.* INLAND REVENUE COMMISSIONERS - **Macnaghten J. 303**

Law of Property (15 Geo. 5, c. 20), s. 115, sub-s. 2. PYKE *v.* PETERS
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Rating and Valuation (15 & 16 Geo. 5, c. 90), s. 2, sub-s. 4. STEPNEY BOROUGH COUNCIL *v.* WOOLF - **Divl. Ct. 202**

Trustee (15 Geo. 5, c. 19), s. 31, sub-s. 2. STANLEY *v.* INLAND REVENUE COMMISSIONERS - **Macnaghten J. 717**

Workmen's Compensation (15 & 16 Geo. 5, c. 84), s. 9, sub-s. 3 (i). BAGGS *v.* LONDON GRAVING DOCK CO.
C. A. 291

JONES *v.* AMALGAMATED ANTHRACITE COLLIERIES, LD. **C. A. 145**

— *s. 29, sub-s. 1; s. 31, sub-s. 1.* COE *v.* L.N.E. RY. - **C. A. 531**

— *s. 43, sub-ss. 1 (a), 2.* WALDEN *v.* MONO CONCRETE CO. **C. A. 683**

1933.

Children and Young Persons (23 Geo. 5, c. 12), s. 70, sub-s. 2. SOUTH SHIELDS CORPORATION *v.* LIVERPOOL CORPORATION - **Divl. Ct. 264**

London Passenger Transport (23 Geo. 5, c. 14), s. 23. SIMON *v.* ISLINGTON BOROUGH COUNCIL - **C. A. 188**

Pharmacy and Poisons (23 & 24 Geo. 5, c. 25), s. 18, sub-s. 1 (a) (iii). ROBERTS *v.* LITTLEWOOD'S MAIL ORDER STORES, LD. **Divl. Ct. 269**

Rent and Mortgage Interest Restrictions (Amendment) (23 & 24 Geo. 5, c. 32), sch. I., para. (g) (ii). PICKFORD *v.* MACE - **C. A. 623**

1935.

Money Payments (Justices Procedure) (25 & 26 Geo. 5, c. 46), s. 1, sub-s. 3. REX *v.* DUNNE. *Ex parte SINNATT*
Divl. Ct. 516

Restriction of Ribbon Development (25 & 26 Geo. 5, c. 47), s. 9, sub-ss. 1, 4 (a). HUCKLE *v.* LOWESTOFT CORPORATION - **Divl. Ct. 59**

1936.

Finance (26 Geo. 5 & 1 Edw. 8, c. 34), s. 20, sub-ss. 1, 6 (a), (b). F. H. P. FINANCE TRUST *v.* INLAND REVENUE COMMISSIONERS - **C. A. 345**

— *s. 21, sub-ss. 1, 8, 10.* EASTWOOD *v.* INLAND REVENUE COMMISSIONERS - **C. A. 314**

Tithe (26 Geo. 5 & 1 Edw. 8, c. 43), s. 3, sub-s. 1; s. 4, sub-s. 2; s. 39, sub-s. 3. TITHE REDEMPTION COMMISSION *v.* WYNNE - **C. A. 756**

1937.

Factories (1 Edw. 8 & 1 Geo. 6, c. 67), s. 14, sub-s. 1. WHITTEN *v.* ARMY AND NAVY STORES **Wrottesley J. 580**

— *s. 14, sub-s. 1; s. 119, sub-ss. 1, 2; s. 130, sub-s. 2.* WRAITH *v.* FLEXILE METAL CO., LD.
Divl. Ct. 24

— *s. 25, sub-s. 4; s. 152, sub-s. 1.* COLE *v.* BLACKSTONE & CO.
Macnaghten J. 615

— *ss. 60, 106, 159.* GARCIA *v.* HARLAND & WOLFF
Atkinson J. 731

1938.

Evidence (1 & 2 Geo. 6, c. 28), s. 1, sub-ss. 1, 2. BAGGS *v.* LONDON GRAVING DOCK CO. - **C. A. 291**

— *s. 1, sub-s. 3.* HOLLINGTON *v.* F. HEWTHORN & CO.
Hilbery J. 27; C. A. 587

Finance (1 & 2 Geo. 6, c. 46), s. 38, sub-s. 2. HERBERT (LORD) *v.* INLAND REVENUE COMMISSIONERS
Macnaghten J. 288

Food & Drugs (1 & 2 Geo. 6, c. 56), s. 3, sub-s. 1; s. 6, sub-s. 1. COLLINS ARDEN PRODUCTS, LD. *v.* BARKING CORPORATION - **Divl. Ct. 419**

— *s. 70, sub-s. 1; s. 80, sub-s. 4; s. 83, sub-s. 3.* BRITISH FERTILIZATION PRODUCTS, LD. *v.* TEAL
Divl. Ct. 275

Middlesex County Council (General Powers) (1 & 2 Geo. 6, c. xcix), s. 118, sub-ss. 1, 2. ADAMS & WATTS *v.* SOUTHAL RATING AUTHORITY
Divl. Ct. 359

1939.

Courts (Emergency Powers) (2 & 3 Geo. 6, c. 67), s. 1, sub-s. 1. FAGOT v. GACHES - - - **C. A. 10**

— s. 1, sub-s. 2 (a) (i.), sub-s. 4. STEPNEY BOROUGH COUNCIL v. WOOLF - - - **Divl. Ct. 202**

— s. 1, sub-s. 2 (a) (ii.) (iii.). BUTCHER v. POOLE CORPORATION **C. A. 48**

Landlord & Tenant (War Damage) (2 & 3 Geo. 6, c. 72), s. 6, sub-s. 1; s. 11, sub-s. 1 (a). WALLIS & CO. (COSTUMIERS), LD. v. OPPENHEIM **C. A. 178**

— s. 10, sub-s. 1 (c); s. 15. PRUDENTIAL ASSURANCE CO. v. REVILLE, LD. - - - **C. A. 448**

Limitation (2 & 3 Geo. 6, c. 21), *s. 2, sub-s. 1 (d); s. 2, sub-s. 3; s. 27, sub-ss. 1, 6; s. 31, sub-s. 1; s. 32. LEIVERS v. BARBER, WALKER & CO. **C. A. 385**

Rent and Mortgage Interest Restrictions (2 & 3 Geo. 6, c. 71), s. 3, sub-s. 1; sch. 1. DAVIES v. WARWICK **C. A. 329**

— s. 3, sub-s. 2 (b). GRAY v. FIDLER - - - **C. A. 694**

1941.

Finance (4 & 5 Geo. 6, c. 30), s. 25, sub-s. 1. PYKE v. PETERS - **Asquith J. 242**

Landlord and Tenant (War Damage) (Amendment) (4 & 5 Geo. 6, c. 41), s. 2, sub-s. 5; s. 10, sub-ss. 1, 2; sch. PRUDENTIAL ASSURANCE CO. v. REVILLE, LD. - - - **C. A. 448**

— s. 14. WALLIS & CO. (COSTUMIERS), LD. v. OPPENHEIM **C. A. 178**

Pharmacy and Medicines (4 & 5 Geo. 6, c. 42), s. 17, sub-s. 1. NAIRNE v. STEPHEN SMITH & CO., LD. **Atkinson J. 17**

War Damage (4 & 5 Geo. 6, c. 12), s. 25, sub-s. 5. IDEAL LIFE ASSURANCE CO. v. HIRSCHFELD - **C. A. 442**

ERRATA.

Page 202. Headnote, line 12: for "respondents" read "appellants."

Page 592. Line 19: after "court" read "(Lord Greene M.R., Goddard and du Parc J.J.)."

CASES
 DETERMINED BY THE
 KING'S BENCH DIVISION
 OF THE
 HIGH COURT OF JUSTICE
 AND BY THE
 COURT OF APPEAL
 ON APPEAL THEREFROM
 AND BY THE
 COURT OF CRIMINAL APPEAL
 AND BY THE
 RAILWAY AND CANAL COMMISSION

REX *v.* DASHWOOD.

1942
Aug. 25, 26.

Criminal law—Appeal—Fresh evidence—Power of Court of Criminal Appeal to hear—Issue withheld from jury by appellant.

The appellant, with another man, was convicted of murder. At his trial the appellant, although he had asked for and been granted legal aid, refused to allow counsel to say anything in his defence, and counsel retired from the case. In consequence, a plea of insanity which counsel had wished to raise was not placed before the jury, but at the end of the case for the prosecution counsel, as *amicus curiae*, called the attention of the judge to the existence of evidence bearing on the sanity of the appellant. The appellant appealed against his conviction and asked leave to call this evidence :—

Held, that the application must be refused, for the jurisdiction of the court was strictly limited by the Criminal Appeal Act, 1907, which gave the court no power to embark, as a tribunal of fact, on the determination of an issue which had never been raised before the jury and which, moreover, the appellant himself had deliberately withheld from the jury.

APPEAL against conviction.

1942

REX
v.

DASHWOOD.

The appellant, Samuel Sydney Dashwood, was convicted at the Central Criminal Court, with one Silverosa, of the murder of one Leonard Moules. At his trial the appellant, who had applied for counsel under the Poor Prisoners' Defence Act, and been given the service of Serjeant Sullivan K.C. and W. G. Fordham, persistently refused to allow counsel to say anything in his defence. Thereupon, counsel retired from the case, and a plea of insanity, which they had wished to raise, was never placed before the jury. At the close of the case for the prosecution, however, Serjeant Sullivan called the attention of Wrottesley J. to the existence of medical evidence bearing on the state of mind of the appellant. The appellant appealed against his conviction and asked for leave to call this evidence in support of a plea of insanity.

Serjeant Sullivan K.C. and W. G. Fordham for the appellant. The judge ought to have called, or allowed to be called, these witnesses as to the state of mind of the appellant, despite the appellant's protests against any evidence being called on his behalf. There is no precedent for that course being taken, but the courts have to administer justice, and everything should be done to secure that a prisoner does not by his own action prevent the court having before it all the evidence which is relevant to his case. If the court is satisfied that a prisoner, for some reason of pique, has made up his mind to be convicted, and evidence is brought to its notice which goes to prove that the prisoner did not commit the crime with which he is charged, justice demands that the prisoner's objection to that evidence being called shall be overruled.

L. A. Byrne for the Crown. This is virtually an application for a new trial, and it has not been made clear whether the new trial is to be before a jury or by this court. This court has no power under the Criminal Appeal Act, 1907, to order a new trial by a jury. If it is to be a new trial in this court then the court will have to embark on a trial of the whole case *de novo*. There is no case in which this court has ever contemplated trying an issue which was never put before the jury by reason of the conduct of the prisoner. If the present application is acceded to, this court will be usurping the functions of a jury. This court will review the verdict of a jury, but will never find a verdict, or try an entirely new issue.

Cur. adv. vult.

1942. Aug. 26. HUMPHREYS J. delivered the following judgment of the court (HUMPHREYS, HILBERY and TUCKER JJ.). We are asked by Serjeant Sullivan to allow witnesses to be called before this court on an issue different from any which was ever put before the jury. We have been told it is the view of counsel that the appellant would have been well advised to raise at the trial the question of his sanity, that is, of his responsibility in law, having regard to the state of his mind, for the act which he committed. It was at the express desire, indeed, with the avowed determination, of the appellant, that no such issue was raised. This is no case in which some new evidence has come to light which was never dreamt of in the course of the trial. The matter was considered by the person most concerned, that is, the appellant, who decided that he would not have the question of his sanity raised as an issue before that jury, and we are now asked to allow that to be done. This, then, is not an application for leave to call further evidence, because that involves that the further evidence is to strengthen some plea which has been before the jury, but which, perhaps owing to the absence of that evidence, has not been as effectively put to the jury as it might have been. This is an application, in effect, that this court should substitute itself for the jury as a tribunal of fact, and try the case anew on issues and pleas which were never before the jury. It is well known that this court has no power to order a new trial by a jury, and without making any general observations as to what may happen hereafter in some other case, but dealing with this case, I say that it would require some very remarkable circumstance to justify this court in turning itself into a tribunal of fact and deciding such an important issue as that which we are invited to decide when that issue has been deliberately withheld from the jury by the desire of the person who is now asking us to consider it.

What is the reason why it is said that we should do what would be entirely without precedent if we did it, namely, embark on this inquiry? The application appears to be based solely on the assumption, which we are asked to make, that the appellant, in deciding not to raise this issue before the jury, did so as the result of his then state of insanity. We ask ourselves: Where is the evidence that that was his state of mind at the time of the trial? No medical report or statement of any sort or description has been furnished to us which would afford any ground for such a holding by us. When

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we look at the nature of the crime, robbery with violence for the purpose of stealing jewellery, and the circumstances of the crime—its careful planning by two men and its carrying out—and the long, careful, well-expressed statement which was made by the appellant, accurately stating the facts of the case, we can find no justification for assuming that the appellant was so insane at the time of the trial that he was unable to appreciate his own action in refusing to raise a defence which, it may be, was recommended to him by his counsel.

It is a cardinal principle of our law that no man can be tried for a crime unless he is in a mental condition to defend himself. That matter was present to the minds of the appellant's counsel when he pleaded "Not guilty." It was open to them at that time, if they had so desired—indeed, it was their duty if they so thought—to invite the judge to do what he would have been bound to do, namely, direct that the issue of the appellant's ability to plead should be tried by a jury. That would have been done, and it should be known, if there is any person who is not aware of it, that the court acts in such a case on information conveyed to it from any quarter. It does not matter whether the information comes to the court from the defendant himself or his advisers or the prosecution or an independent person, such as, for instance, the medical officer of the prison where the defendant has been confined. With that knowledge two experienced counsel decided that they had no material before them on which they could even invite the judge to allow the jury to consider such a question. We find it impossible to assume, from the mere fact that the appellant differed from his counsel, however experienced and wise they no doubt are, as to the best line to be taken in his interest, that he was in such a condition owing to his insanity as to be incapable of conducting his own defence.

One of the matters which this court has to consider, is what would be, or might be, the result of creating this precedent. In our opinion, it would be a most dangerous precedent to create, for, if we acceded to this application, we should be encouraging every person charged with any serious crime before a jury to instruct his counsel to conduct such defence as he thinks right before the jury, and, if that fails, to come to this court and ask that the state of mind of the accused person should be inquired into. We decline

to accede to that course. Indeed, in our view, we have no power to enter on any such inquiry. I refer to the terms of the statute under which we sit, for this court is no more free to do that which it likes in any case than is any other court of justice. We are within what Lord Halsbury used to describe as the iron framework of a statute, and by s. 4, sub-s. 1, of the Criminal Appeal Act, 1907: "The Court of Criminal Appeal, on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence"—that is, the evidence before the jury—"or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law"—that does not arise here—"or that on any ground there was a miscarriage of justice"—that does not arise—"and in any other case shall dismiss the appeal." In our view the only course which we can adopt is to refuse the application which has been made to us to embark on this new and fresh inquiry.

I desire to add that, so far as it has been possible to do so, we have examined the material handed up to us by Serjeant Sullivan. It is plain from the consideration of those documents that this is not a case in which it can be said that there is a clear case to support a plea of insanity. We merely observe that there might properly have been put before a jury an issue on which there would have been the most acute controversy.

Appeal dismissed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*

Solicitor for Crown: *Director of Public Prosecutions.*

A. W. G.

MODEL FARM DAIRIES (BOURNEMOUTH), LIMITED
v. NEWMAN.

C. A.

1942

Oct. 5.

A. V. HAMBRO, THIRD PARTY.

Practice — Interrogatories — Admissibility — Question whether person typhoid germ carrier at a certain time.

It is admissible to put to a person an interrogatory relating to

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the state of his health at a given time. Therefore, an interrogatory: "To the best of your present knowledge, information and belief, were you not a carrier of a typhoid germ in the year '1936?' " was *held* to be admissible.

APPEAL from Croom-Johnson J.

In 1939 the plaintiffs commenced proceedings against the defendant for damages for breach of an agreement dated October 8, 1935, for the sale to them during the period from October 13, 1935, to September 30, 1936, of milk from cows kept by him on Merley Hall Farm, Canford, Dorset, such milk being expressly or impliedly warranted to be pure new milk fit for human consumption. The plaintiffs alleged that, in July and August, 1936, in breach of the warranties, the defendant delivered milk infected with the germ of typhoid fever. The defendant obtained leave to add Captain Angus Hambro, of Merley Hall, as a third party, and alleged that if (which he denied) his cows were infected with the germs of typhoid fever, this was attributable to their drinking from a stream into which sewage matter was discharged from Merley Hall at a point above the farm. As a result of the outbreak of typhoid an inquiry had been held on behalf of the Ministry of Health by Dr. Vernon Shaw (since deceased), and in the course of his investigation he came to the conclusion that Captain Hambro was an unsuspected typhoid germ carrier. In these circumstances the defendant applied for leave to deliver to Captain Hambro interrogatories of which one was: "During 'the investigation by officials of the Ministry of Health into 'the cause of the outbreak of typhoid fever at Bournemouth 'and Poole in the year 1936, were not you examined and 'found to be a carrier of the germs of typhoid fever?' " Master Jelf and, on appeal, Croom-Johnson J. refused to allow this interrogatory. The defendant appealed.

Flowers K.C. and *H. H. Maddocks* for the defendant. The interrogatory ought to be allowed. Captain Hambro has only got to answer to the best of his information and belief. Croom-Johnson J. refused to allow the interrogatory on the ground that it would put the third party to the expense of consulting experts: *Rofe v. Kevorkian* (1), but that case has no real application here. The question whether a picture is genuine is very different from one asking a man about the state of his health.

Beecroft (*Valentine Holmes* with him). This is really a fishing interrogatory and the case is directly covered in principle by *Rofe v. Kevorkian* (1). The doctor who said that Captain Hambro was a carrier of typhoid germs is dead, and it is, therefore, impossible to test his opinion. If Captain Hambro answers that he was advised by a doctor that he was a germ carrier, that may be taken as an admission. He can give no answer of his own knowledge. The interrogatory only aims at getting Captain Hambro to repeat the opinion of someone else and it ought not to be admitted.

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GODDARD L.J. It is clear that at the trial the question will be whether at the relevant time Captain Hambro was not responsible for the typhoid germs in the milk although he did not know that he was a typhoid carrier. An interrogatory seeking to establish this fact was disallowed by the learned judge on the authority of *Rofe v. Kevorkian* (1). The actual form of the interrogatory which was submitted was not, I think, correct, but objection was taken not so much on the form as on a matter of substance. The interrogatory could have been re-drafted and, if necessary, I think it should be.

The question is whether an interrogatory in this form, "To 'the best of your present knowledge, information and belief, 'were you not a carrier of a typhoid germ in the year 1936?', is admissible, because we propose in allowing this appeal to allow the interrogatory in that form. I am unable to see why you should not put to a person an interrogatory as to what was the state of his health at a certain period. In insurance cases on accident policies and life policies, the question is frequently asked whether a person was suffering from a disease at some particular time, or, indeed, whether either of his parents may not have suffered from the disease, because the question is often asked in proposals for insurance policies whether or not parents have had or died of any of certain diseases. The question which is sought to be put here is what was the state of Captain Hambro's health according to the information and belief which he had at the time. I think that is a fair question and one which can properly be asked. If it could not be asked, the defendant, who seeks to claim over against Captain Hambro, might be put in a wholly undeserved position of difficulty.

Rofe v. Kevorkian (1) was a different case. It was sought to

(1) [1936] 2 All E. R. 1334.

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interrogate a testator's executors who were being sued whether he had believed certain pictures or miniatures to be genuine, and whether in fact they were genuine. Although it is not easy to say in what respect the two cases differ from one another, I think that to ask a person in an interrogatory about his state of health is very different from asking him his opinion whether or not a work of art is genuine. Scott L.J. in *Rofe v. Kevorkian* (1) said that the case raised the important question "whether an interrogatory asking a question of pure expert opinion ought properly to be administered to a party when that party can only answer it by consulting experts in advance." In my view, the question whether a person was suffering from a particular complaint or was in a particular condition of health at a particular time is not to be regarded as a matter of pure expert opinion in the sense in which the learned lord justice was there using the expression. Captain Hambro can answer this question now without consulting experts in advance. If he could have been asked (as I have no doubt he could have been asked had the facts justified it): "Were you suffering from typhoid fever in 1936?", I do not think that there could be any objection to asking him whether, according to the best of his knowledge, information and belief, he was a carrier of typhoid germs in that year. For these reasons, I think that the appeal should succeed and the interrogatory be allowed in the form I have mentioned.

DU PARCQ L.J. I agree. I felt a little doubt during Mr. Beecroft's argument whether he was not right in saying that Captain Hambro might find himself, as an honourable man, compelled to give an answer which would be taken as an admission of something which otherwise would rest only on the opinion of an eminent physician who is no longer living. I felt that a man might be in a difficult position if he thought that it would not be honest to say: "I do not know," or, indeed, that if he said: "I do not know," a further and better answer might be required of him, and were thus compelled in effect to adopt an opinion of which in his own mind he entertained some reasonable doubt. On consideration, however, I think that that is rather a fanciful objection. It is impossible for the court to know at this stage what the precise facts are, but it may be that the evidence placed before Captain Hambro was such that he really can have no doubt

(1) [1936] 2 All E. R. 1334.

that he was a typhoid carrier. It may happen to anyone. On the other hand, he may feel, as the result of advice, that the matter is doubtful, and in that case it would be possible for him to guard himself by the form of his answer.

In my opinion it is not right to compare this case with *Rofe v. Kevorkian* (1) or to try to get any support from that decision. The truth is that these questions of interrogatories, like most other questions, must be considered according to the facts of the particular case. Everyone would say, I think, that it is wrong to ask a man to answer on oath a question which, as we know, gives rise to so much discussion among art critics, as one about the authorship or age of a picture. The most he could say is "sub judice lis est," and that is of no use to anybody. Here we have a case which is more closely analogous to the case in which a question is put concerning some illness: "Were you suffering from tuberculosis or 'pneumonia at such and such a date?' " "Did your child 'have measles at such and such a date?' " In answer to the latter question, a very careful person might say: "My child 'presented the following appearance . . . I was assured by 'the doctor that he was suffering from measles. I myself 'cannot say,' but many perfectly honest people would think it sufficient to say, 'Yes, he had measles.' "

This case is not so simple as that. If there is any real doubt about this matter, Captain Hambro will be safeguarded. If there is no real doubt about it, I think it would be a grave misfortune that the defendant should have to go to trial and do his best, occupying a great deal of time and spending a great deal of money, when the ground ought to have been cleared by an admission. For these reasons I agree with my lord that this appeal should be allowed and an interrogatory in the form which he has suggested admitted.

Appeal allowed.

Solicitors for the defendant: *Walmsley & Stansbury, for E. W. Marshall Harvey & Dalton, Bournemouth.*

Solicitors for third party: *Broad & Sons, for Luff, Raymond & Williams, Wimborne Minster, Dorset.*

(1) [1936] 2 All E. R. 1334.

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FAGOT v. GACHES.

1942
Oct. 9.

Practice—Examination of judgment debtor as to means—Enforcement of judgment—Necessity for leave—R. S. C., O. XLII., r. 32—Courts (Emergency Powers) Act, 1939 (2 & 3 Geo. 6, c. 67), s. 1, sub-s. 1.

An application under R. S. C., O. XLII., r. 32, for the examination of a judgment debtor as to means does not come within the words "enforcement of any judgment or order of any court for the payment or recovery of a sum of money," in s. 1, sub-s. 1, of the Courts (Emergency Powers) Act, 1939, and, therefore, the leave of the court need not be obtained before an application for such an examination is made.

Galbraith v. McKenna [1941] Ch. 137 overruled.

APPEAL from Asquith J.

The defendant recovered on his counterclaim in the action judgment for damages to be ascertained by an official referee under s. 89 of the Supreme Court of Judicature (Consolidation) Act, 1925, for the wrongful detention and conversion of goods, and also for an amount to be ascertained by a similar inquiry as to damages (if any) which he had suffered by reason of the breach by the plaintiff of an undertaking given by him in previous proceedings in the Court of Appeal, and for one-third of the costs of the claim and counterclaim in the action. Before any inquiry before an official referee had taken place, the defendant applied to the master under R. S. C., O. XLII., r. 32, asking that the plaintiff should be ordered to attend for an examination as to his means of satisfying the judgment. The plaintiff resisted the application, contending that in view of the decision in *Galbraith v. McKenna* (1) the defendant should first have obtained leave to enforce the judgment under s. 1, sub-s. 1, of the Courts (Emergency Powers) Act, 1939 (2). The master held that this was unnecessary, as proviso (c) to the sub-section applied, and he made an order for examination as to the plaintiff's means. Asquith J. affirmed the decision of the master, and the plaintiff appealed.

(1) [1941] Ch. 137.

(2) Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 1: "Subject to the provisions of this section, a person shall not be entitled, except with the leave of the appropriate court, to proceed to execution on, or otherwise to the enforcement of, any judgment or order of any court

" for the payment or recovery of a sum of money: " Provided that nothing in this sub-section shall apply to— " (a) any judgment for the recovery of damages for tort; " (c) any judgment or order under which no sum of money is recoverable otherwise than in respect of costs."

Reported by F. R. R. Burford, Esq., Barrister-at-Law.

Cartwright Sharp K.C. and *Astell Burt* for the plaintiff. Asquith J. was wrong. The decision in *Galbraith v. McKenna* (1) was correct. To "proceed to execution" in s. 1, sub-s. 1, of the Courts (Emergency Powers) Act, 1939, means to take any step in the direction of execution, and to apply for an examination as to means is to take such a step. Provisos (a) and (c) to that sub-section do not apply to the present case.

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Gerald Gardiner for the defendant. The decision in *Galbraith v. McKenna* (1) was on too wide a basis. It cannot be said that an application for examination as to means comes within the scope of the words "proceed to execution on, or otherwise" to the enforcement of, any judgment or order" in s. 1, sub-s. 1, of the Act. Moreover, the judgment, so far as it was for a sum of money, was only in respect of costs and, therefore, proviso (c) to s. 1, sub-s. 1, applies. Alternatively, the judgment being for damages for tort and costs, provisos (a) and (c) would both apply.

MACKINNON L.J. This appeal fails. I do not agree with the decision of Simonds J. in *Galbraith v. McKenna* (1) that a judgment creditor who seeks an order under R. S. C., O. XLII., r. 32, for the examination as to means of the judgment debtor must first obtain the leave of the appropriate court so to proceed under s. 1, sub-s. 1, of the Courts (Emergency Powers) Act, 1939. I am clear that the making of an application for such an order is not a proceeding "to execution" on, or otherwise to the enforcement of, any judgment . . . "for the payment or recovery of a sum of money" within the sub-section.

That is the more important aspect of this appeal, but there is another ground on which the orders of the master and the learned judge were right. The judgment in question was for damages to be ascertained by an official referee, and that is not a judgment for any ascertained sum. So far as it was a judgment for an ascertained sum, it was for costs only, and, therefore, it came within the words of proviso (c) to the sub-section. Mr. Gardiner also argued that the judgment, if it was for a sum of money to be ascertained, was for damages for tort, but it is unnecessary to deal with that. I think the appeal fails on the broader ground that I have stated.

GODDARD L.J. I agree. In my view, we ought to overrule (1) [1941] Ch. 137.

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the judgment of Simonds J. in *Galbraith v. McKenna* (1) for the reasons which have been given by MacKinnon L.J. There are no words in the Act which force us to come to the conclusion that an application to examine a judgment debtor as to means can only take place by leave of the court, and it would seem unnecessary and almost absurd that one should have to duplicate proceedings in that way. The object of examining a judgment debtor is to find out whether he has got means, and, incidentally, whether it is worth making an application under the Courts (Emergency Powers) Act, 1939, for leave to proceed to enforce the judgment. The mere fact that a debtor is to be examined to ascertain whether he has any means on which execution may issue does not seem to me to fall within the words of the Courts (Emergency Powers) Act, 1939. I think Simonds J. took too wide a view in holding, as he did in *Galbraith v. McKenna* (1) that a preliminary application must be made to the court before the court can be asked to grant leave to examine. I also agree that this is a judgment for costs only. On both these grounds I think the order of Asquith J. was right.

DU PARCQ L.J. I agree that Simonds J. was wrong in the view which he took in *Galbraith v. McKenna* (1). I think, with great respect to the learned judge, that he was in error in saying that the words "to proceed to execution on, or otherwise to the enforcement of, any judgment or order of any court" must be read as meaning "to take any step in the direction of the execution or enforcement of any judgment or order." To my mind, "to proceed to execution on," or "to proceed to the enforcement of," a judgment is only a way of saying "to execute" or "to enforce," that is, to go to the length of executing, or to go to the length of enforcement, and I do not think that normally anyone, whether a lawyer or a layman, would say that a party who applies for an order for the examination of the judgment debtor as to means is executing or enforcing the judgment. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Phoenix, Levinson, Walters & Shane.*

Solicitors for defendant: *C. Grobel, Son & Co.*

(1) [1941] Ch. 137.

CHARMAN *v.* THOMAS.1942
Oct. 14.

Emergency legislation—Food control—Rationing—Butter—Maximum prices—Defence (General) Regulations (St. R. & O., 1939, No. 927), reg. 55—Rationing Order, 1939 (St. R. & O., 1939, No. 1856), para. 6—Butter (Maximum Prices) (No. 2) Order, 1940 (St. R. & O., 1940, No. 773), sch. (as amended by St. R. & O., 1941, No. 666, art. 1 (c)).

By the schedule to the Butter (Maximum Prices) (No. 2) Order, 1940, as amended by art. 1 (c) of St. R. & O., 1941, No. 666, the maximum price for butter was fixed at 1s. 7d. per pound, which represented a maximum price of 4½d. for a quarter of a pound, and fractions of a farthing were to be counted as farthings, so that the maximum price for two ounces was 2½d. A customer at the stores of the appellant asked for a quarter of a pound of butter and presented her own ration book and that of her husband in each of which the appellant's shop assistant cancelled one butter ration coupon. The butter ration at the material date was two ounces for each customer. The assistant supplied the customer with a total amount of four ounces and charged her 5d., being the controlled price for two rations each of two ounces, but a farthing in excess of the maximum price for a quarter of a pound:—

Held, that the transaction was a single sale of a quarter of a pound of butter, for which the maximum price was 4½d., and the appellant, therefore, was guilty of selling butter at a price exceeding the maximum.

CASE stated by justices.

At a court of summary jurisdiction sitting at Aberystwyth on December 10, 1941, an information was preferred by the respondent, David John Thomas, under reg. 55 of the Defence (General) Regulations, 1939, and art. 2 of the Butter (Maximum Prices) (No. 2) Order, 1940, against the appellant, John Morgan Charman, for that he on September 19, 1941, sold butter by retail at a price exceeding the maximum price prescribed in the schedule to the Butter (Maximum Prices) (No. 2) Order, 1940, as amended by art. 1 (c) of St. R. & O., 1941, No. 666. The facts appear sufficiently in the headnote. The justices were of opinion that the transaction was a sale of a quarter of a pound of butter at a price which was a farthing in excess of the prescribed maximum price. They, therefore, convicted the appellant and fined him 10s. The appellant appealed.

Lloyd-Jones for the appellant. The justices were wrong in finding that there was one sale of four ounces of butter. In truth, there were two sales of two ounces each. The ration per

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person was only two ounces, and the customer could only purchase two ounces for herself and two ounces as agent for her husband—a named principal. It could make no difference that for convenience the two quantities were amalgamated into one package and were entered as one quantity in the account delivered to the customer. [Reference was made to para. 6 of the Rationing Order, 1939 (St. R. & O., 1939, No. 1856), and to the following notice endorsed on ration books: "This book may only be used by and on behalf of the person named on the cover. . . ."]

Beecroft (Valentine Holmes with him) for the respondent, was not called upon to argue.

VISCOUNT CALDECOTE C.J. In my judgment a very few words are sufficient to dispose of this case. It is almost sufficient, to enable one to arrive at the proper answer to the question submitted to the court, to read the following findings in the case stated: "The appellant is a grocer and provision dealer, carrying on business . . . at Terrace Road, Aberystwyth," and: "On September 19, 1941, . . . [a customer] went to the appellant's stores and asked an assistant . . . for a quarter of a pound of butter." The argument which has been submitted to us is that the customer was not in a position to order a quarter of a pound of butter, but that all she was authorized by law to do was to ask for two packets of two ounces of butter apiece. I do not accept that submission. I think that she was perfectly within her rights in asking for a quarter of a pound of butter. No doubt there were two conditions on the fulfilment of which alone she would be given the butter by the grocer. The first was that she must pay for it or satisfy the grocer that he would be paid. The other was that she should present coupons from ration books which she was lawfully using. Paragraph 6 of the Rationing Order, 1939, provides that, "except where the Minister shall otherwise authorize, rationed food may be obtained for household consumption only up to the prescribed amount, and only by means of a ration book, or leaf, or coupon, or other ration document available for lawful use and lawfully used." It cannot be disputed that the customer was lawfully using her own ration book and a further one which was available for lawful use and was lawfully used by her, and when she ordered her quarter of a pound of butter from the grocer she was entitled to present her own ration book and that of her husband.

Thereupon she fulfilled the second condition. In my judgment the justices were right in their decision in this case, that the transaction was a sale of a quarter of a pound of butter to this customer, for which the sum of fivepence was charged and paid, and that the amount charged was excessive by one farthing of the correct amount. The appeal will be dismissed, with costs.

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Caldecote C.J.

TUCKER J. I agree.

CASSELS J. I agree.

Appeal dismissed.

Solicitors for appellant : *Jaques & Co., for Smith, Davies & Jessop, Aberystwyth.*

Solicitor for respondent : *Treasury Solicitor.*

A. W. G.

HODGSON v. LAKEMAN.

1942

Oct. 14.

Appeal—Divisional Court—Case stated by justices—Death of appellant before hearing—Interest of executors—Power of court to hear appeal.

When an appeal to the High Court against a conviction by justices has been entered but the appellant dies before it has been heard, and it appears that his executors have an interest in the appeal, the court has jurisdiction to allow the executors to prosecute the appeal.

CASE stated by Carlisle justices.

On June 9, 1941, an information was preferred by the chief constable of Carlisle against Charles William Allan Hodgson, clerk to the Cumberland County Council, under the Defence (General) Regulations, 1939, charging him with a breach of the Lighting (Restrictions) Order, 1940, at one of the council's offices. The justices "being of opinion that the Cumberland County Council was guilty of the offence charged" convicted Mr. Hodgson "as their clerk and chief officer," and imposed a fine of 35s. No charge had been preferred against the council. Mr. Hodgson entered an appeal against his conviction and on his application the justices stated a case, but he died before the appeal could be heard by the High Court. By leave of the

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court, the question whether the appeal could be proceeded with was argued.

G. O. Slade, in support of the appeal. The offence of which Mr. Hodgson was convicted was committed while he was miles away from the council's office, but he was convicted as chief officer of the council. In law obviously he could not be convicted, and his two executors desire the appeal to be argued. The fine was a small one, but the same principle would apply where a defendant was wrongfully convicted and fined many thousands of pounds, and then died before the hearing of his appeal. The practice in regard to this question does not appear to be uniform: see Short & Mellor's Crown Office Practice, 2nd ed., p. 425, but in *Rex v. Roberts* (1) a conviction was affirmed after the death of the defendant.

[VISCOUNT CALDECOTE C.J. The executors of Mr. Hodgson are interested in administering the estate, and to that extent they would be interested in this appeal. I am also informed that in *Roe v. Chatworthy* (2), where a preliminary point was taken in this court, that the person convicted was dead, the point was argued and the court decided to hear the appeal.]

Valentine Holmes, for the respondent. I do not see how I can support this conviction.

Slade. If the court think proper to quash the conviction I am prepared, on behalf of the executors, to accept that and not to ask for costs.

Valentine Holmes. In civil proceedings provision is made for such a position as this, but there is no such provision in criminal proceedings.

[VISCOUNT CALDECOTE C.J. There is difficulty in quashing the conviction if there is nobody alive to appeal. Is there any objection to the court proceeding to hear the appeal as though the executors had been added as appellants?]

Holmes. The court cannot hear counsel for a dead person, but, if the executors satisfy the court that they have an interest in the appeal, the court, by its inherent jurisdiction, can allow them to proceed with the appeal. That was done in *Siberry v. Connolly* (3). I concede that the executors here have an interest.

VISCOUNT CALDECOTE C.J. The executors of the deceased appellant claiming an interest in the appeal, and the respondent

(1) (1732) 2 Strange 937.

(2) (May 23, 1940) Unrep.

(3) Short & Mellor's Crown Office Practice, 2nd ed., p. 425.

not disputing that claim, we give leave to Mr. Slade to argue the appeal on behalf of the executors. The conviction will be quashed.

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TUCKER J. I agree.

CASSELS J. I agree.

Solicitors for appellant : *Harding & Munby.*

Solicitors for respondent : *Charles Russell & Co., for Thompson, Mawson & Harston, Carlisle.*

A. W. G.

NAIRNE *v.* STEPHEN SMITH AND COMPANY, LIMITED,
AND THE PHARMACEUTICAL SOCIETY OF
GREAT BRITAIN.

1942

Oct. 5, 14.

*Medicine—Sale by retail—“ Substance recommended as a medicine ”—
Treatment of ailment—Tonic wine—Indication of use as drink and
not as medicine—Pharmacy and Medicines Act, 1941 (4 & 5 Geo. 6,
c. 42), s. 17, sub-s. 1.*

The defendant company sold by retail an article known as Hall's Wine which was referred to on a label affixed to the container in the following terms : “ Hall's Wine. Tonic beverage. “ The leading tonic beverage for giving new life in all run-down “ conditions. It embodies all the restorative value of pure natural “ wine, combined with approved tonic and nutritive elements. “ A wine-glassful is a great help when you are tired or when convales- “ cent after illness and in any case where a tonic is desirable. For “ fifty years doctors have recommended Hall's Wine for its “ assistance in convalescence after serious illness ” :—

Held, that this label described the substance called Hall's Wine in terms calculated to lead to its use for the prevention or treatment of an ailment, namely a “ run-down ” condition, affecting the human body, and, therefore, came within the definition of a “ substance recommended as a medicine ” in s. 17, sub-s. 1, of the Pharmacy and Medicines Act, 1941, and that it contained no such definite indication that it was intended to be used as a drink and not as a medicine as would take it out of the section under the last part of the definition.

ACTION in the Commercial List tried by Atkinson J.

The plaintiffs, John Cyril Nairne and Noel Spencer Nairne, were shareholders in the defendant company, Stephen Smith & Co., Ltd., which had for many years manufactured and

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sold by retail a preparation known as Hall's Wine. This was a friendly action to determine the question whether, on the true interpretation of s. 17 of the Pharmacy and Medicines Act, 1941 (1), Hall's Wine was a "substance recommended as a medicine" so that it could not legally be sold by retail unless labelled in accordance with s. 11 of the Act. The second defendants, the Pharmaceutical Society of Great Britain, were the statutory body entrusted under the Act with the enforcement of its provisions, and, with their consent, they were joined as defendants that they might be bound by the judgment. Hall's Wine comprised a substance which was referred to on a label affixed to the container in the following terms:—

"Hall's Wine.

"Tonic Beverage.

"The leading tonic beverage for giving new life in all run-down conditions. It embodies all the restorative value of pure natural wine, combined with approved tonic and nutritive elements. A wineglassful is a great help when you are tired or when convalescent after illness and in any case where a tonic is desirable. For fifty years doctors have recommended Hall's Wine for its assistance in convalescence after serious illness."

(1) By Pharmacy and Medicines Act, 1941, s. 11, sub-s. 1: "Sub-
"ject to the provisions of this Act,
"no person shall—(a) sell by
"retail any article consisting
"of or comprising a substance re-
"commended as a medicine
"(b) unless there is written so as
"to be clearly legible on the article
"or a label affixed thereto . . . (i.)
"the appropriate designation of
"the substance so recommended,
"or of each of the active con-
"stituents thereof, or of each of
"the ingredients of which it has
"been compounded; and (ii.) in
"a case where the appropriate
"designation of each of the active
"constituents or the ingredients is
"written as aforesaid, the appro-
"priate quantitative particulars
"of the constituents or ingre-
"dients."

By s. 17, sub-s. 1 " ' Sub-
" ' stance recommended as a
" ' medicine,' in relation to the
" ' sale of an article consisting of or
" ' comprising a substance so recom-
" ' mended, means a substance
" ' which is referred to—(a) on the
" ' article or on any wrapper or
" ' container in which the article
" ' is sold, or on any label affixed
" ' to, or in any document enclosed
" ' in, the article or such a wrapper
" ' or container; in terms
" ' which are calculated to lead to
" ' the use of the substance for the
" ' prevention or treatment of any
" ' ailment, infirmity or injury
" ' affecting the human body, not
" ' being terms which give a definite
" ' indication that the substance is
" ' intended to be used as, or as
" ' part of, a food or drink, and not
" ' as, or as part of, a medicine."

The plaintiffs claimed a declaration that Hall's Wine consisted of or comprised a substance which was referred to on the label affixed to the container in such terms that it was a "substance recommended as a medicine" within the meaning of s. 17, sub-s. 1, of the Pharmacy and Medicines Act, 1941, in that the terms of the label were calculated to lead to its use for the prevention or treatment of some ailment, infirmity, or injury affecting the human body and were not terms which gave a definite indication that the substance was intended to be used as a drink and not as a medicine, and an injunction to restrain the company from selling it by retail unless it was labelled in accordance with s. 11, sub-s. 1. The defendant society adopted a similar position, and stated that in fact tonics (including tonic wines) were used for the treatment of very numerous ailments or infirmities affecting the human body, in particular, colds, coughs, influenza, shock, weakness of old age, most minor ailments, and the convalescent stages of most serious ailments. The defendant company denied that, on the true interpretation of s. 17, sub-s. 1, Hall's Wine was a "substance recommended as a medicine," or that the terms in which it was referred to were calculated to lead to its use for the prevention or treatment of any ailment, infirmity or injury affecting the human body. Those terms, they said, gave a definite indication that Hall's Wine was intended to be used as a drink and not as a medicine, and it was, therefore, lawful for them to sell it by retail without disclosing the designation or quantitative particulars of its ingredients.

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Percy Lamb for the plaintiffs. The label of Hall's Wine brings it within the first part of s. 1, sub-s. 2. *Harding v. Migge* (1) establishes that the court is not concerned with what are the ingredients, but has only to inquire for what the substance is recommended.

Blanco White K.C. and *Holroyd Pearce* for the defendant society. Very little assistance is to be derived from cases like *Harding v. Migge* (1) which were decided under earlier legislation because the legislature has now given a statutory definition to the words "recommended as a medicine." The important thing is how the substance is described, not its name. The terms of the label must be looked at as a whole. If those terms are calculated to lead to the use of the substance for the prevention or treatment of any ailment, etc., the

(1) (1909) 101 L. T. 459.

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substance will come within the Act unless it is made clear in definite terms that the vendor intends it to be used, not as a medicine, but as a food or drink. [The definitions of "tonic" in the Oxford English Dictionary were cited.] "Tonic" is a well-known medical term. The British Pharmaceutical Codex gives formulæ of a number of medicated wines, including four tonic wines. The words in the present case clearly are calculated to lead to the use of Hall's Wine for the prevention and treatment of ailments, and no definite indication is given that it is intended to be used as a drink and not a medicine, but the defendant society, as the body responsible for the enforcement of the Act, desires guidance as to the proper construction of the definition.

Denning K.C. and *Monier-Williams* for the defendant company. This case must depend on its particular facts, but the principle is far wider. It affects the whole group of wine substances, but it may also affect the groups of milk and meat substances. Hall's Wine has never been charged medicine stamp duty, but it has always paid duty as a wine. To come within the Act of 1941 the terms by which the substance is referred to must be calculated to lead to its use for the prevention or treatment of "any ailment, infirmity or injury." That is aimed at specific ailments, infirmities or injuries. To suffer from "an infirmity" is a different thing from being "infirm," and the Act is aimed at substances which profess to benefit definite infirmities, such as deafness or lameness. Even if "any infirmity" included a general condition of being infirm, that is a very different thing from being "run down," which, it is submitted is not an "ailment, infirmity or injury" within the definition. [They referred to the definition of "infirmity" in the Oxford English Dictionary, and to *Ontario Metal Products Co. v. Mutual Life Insurance Co.* (1)] "Tonic" is a word which has developed in meaning. It is out of favour with the medical profession nowadays, but it is a layman's word for anything strengthening, invigorating and bracing. A definite indication that this is intended to be used as a drink and not as a medicine is more effectively given by the words "wine" and "tonic beverage" than if the defendant company had stated in terms: "This is intended to be used as a drink and not as a medicine."

Blanco White K.C. replied.

Cur. adv. vult.

Oct. 14. ATKINSON J. The two questions which arise are, first: "Is this substance recommended in terms which are calculated to lead to its use for the treatment of any ailment?" and, secondly: "If so, do those terms give a definite indication that the substance is intended to be used as a drink and not as a medicine?"

Hall's Wine has been sold for 50 years as a tonic beverage. During nearly all that time the Medicine Stamp Act, 1812, which required any secret preparation sold as a medicine to pay a stamp duty, was in force, but it was never suggested that this wine was subject to that stamp duty. In fact, it has always been sold by vendors who held an excise licence for the sale of wines. I am told that 83 per cent. of the vendors are wine agents or grocers and only 17 per cent. of them are chemists, and that 88 per cent. of the amount sold is sold by grocers and wine agents, and only 12 per cent. by chemists, who must hold an excise licence.

I think it is necessary to define a few words. A medical witness stated that by "medicine" is meant anything which will influence the functions of the body. The definition of "medicine" in Webster's Dictionary is: "Any substance administered in the treatment of disease; a remedial agent; a remedy"; and the definition of "disease" is: "An alteration in the state of the body or of some of its organs, interrupting or disturbing the performance of the vital functions and causing or threatening pain and weakness." The two definitions seem to coincide if disease is the failure of some function to operate normally and medicine is something which is intended to restore the normal working of the affected function. A "tonic," said the same witness, is a substance which produces a feeling of vigour and tends to disperse the exhaustion which is common during and after illness. The majority of tonics act by increasing the appetite for food, and, in consequence, the secretion of the digestive juices and the efficiency of the absorption of the food. Others act also on the nervous system directly. The British Pharmaceutical Codex defines "tonics" as "substances which assist nutrition and improve the general tone of the system." It gives lists of heart, nerve and stomach tonics, most of which, I imagine, are, without doubt, medicines. In other words, a "tonic" operates in the same way as does a medicine. It aims at restoring healthy functioning. Indeed, the definition in Webster's Dictionary is: "Tonic: restoring healthy functions." That seems to

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me to be precisely what a medicine is intended to do, and I cannot persuade myself that a tonic is not normally—I do not say in every case—a medicine.

In my view, the terms in which this wine is recommended are calculated to lead to its use for the treatment of certain ailments. I am only dealing with the word “ailment,” because, it seems to me, the other two words, “infirmity or “injury,” do not apply to this case. It is said on behalf of the defendant company that the words “any ailment” mean some specific ailment, or, at any rate, that there must be something specific about the claim that the substance in question will be of benefit. I think that is right. I agree that a claim that a substance “is good for you,” or “is a good “tonic” without more would not be within the words of this definition. If, for example, this wine was sold simply as “the finest tonic in the world,” it could not I think, be said that it was brought within this Act. But can I say that a “run-down condition” is not an ailment? And the claim in this case, it will be remembered, is “to give new life in all “run-down conditions.” It seems to me that that is clearly claiming to be of value as a treatment for an ailment or a class of ailments which is indicated with sufficient particularity to bring it within the words of s. 17. I think a run-down condition is obviously an ailment. A run-down condition is, I should have thought, nearly always due to something—such as the glands or the digestive organs—not functioning properly. The most common example of a run-down condition is anæmia, in which iron is ordered as a tonic for the blood. At no time have I had much doubt that this label is within the first part of s. 17.

The next, and by far the more difficult question is whether, although it comes within the first part, it is taken out under the last three lines, of the definition. There is some difficulty in seeing how a substance which is advertised so as to lead to its use as a medicine can at the same time be so advertised as to indicate that it is not intended to be used as a medicine. It would seem that to give some effect to this exception, emphasis must be placed on the words “used as.” The words are not, “give a definite indication that the substance is intended to “be a drink and not a medicine,” but “to be used as a drink “and not as a medicine.” The words point to the method of user, and not the object. The definition given in Webster’s Dictionary of the word “as” is “in the same manner in which,”

and, in my view, this phrase in s. 17, sub-s. 1, means "as if "it were a drink and not as if it were a medicine," that is, in the way in which drink is normally used and for the same purposes, for example, to quench thirst irrespective of whether, at the time of drinking, one feels well or ill. Let me give an example. "Smith's Great Milk Tonic contains all the ingredients of pure milk combined with elements of proved value. The finest preventive of tuberculosis that there is. Discontinue your present drinks and drink Smith's Milk Tonic at every meal, and plenty of it." The first half of that advertisement would bring the substance within the earlier part of the sub-section, but the second part would make it quite clear that the substance was to be used as a drink and not as a medicine. So, if the defendant company, after making the claims which they make—of value in run-down conditions and during convalescence—had said something of this kind: "Use this as a drink instead of whisky and soda when you are tired. Make Hall's Wine your dinner drink and you will be a different man," I should have thought that the substance would be outside the section, because it would be clear that it was intended to be used in the same manner as drink is used. Here the only words directed to the method of use are these: "A wineglassful is a great help when you are tired or when convalescent after an illness and in any case where a tonic is desirable." It is not to be taken irrespective of whether you are feeling ill or well. The invitation is to use it instead of another medicine or tonic which, but for Hall's Wine, you would or ought to be taking. In the face of this, I have felt driven to the conclusion that there is no definite indication that this tonic is intended to be used as a drink and not as a medicine, and I am helped to that conclusion by *Harding v. Migge* (1), where the question was whether certain pills, called "Anti-neurasthin," were a food or whether they were a medicine on which stamp duty under the Medicine Stamp Act, 1812, must be paid. A. T. Lawrence J., in his judgment, said (2): "The tablets in question are, it is true, called in one part of the advertisement a food, but that is only a brain and nerve food. It does not suggest that they are a food in the ordinary sense of the word; and when we look at the analysis, though the analysis shows that a great many things contained in the tablets are the component parts of ordinary food, there is one thing as to which that

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(1) 101 L. T. 459.

(2) Ibid. 463.

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"is not true—namely, ' mineral matter, 4·26 per cent.'"
 "The analysis leaves the thing quite open to this being a
 "medicine in the strict sense of the word. We have the words
 "used, ' usual dose from three to four tablets a day,' and
 "' to be taken between meals.' Therefore it is not a food
 "in the ordinary sense, but it is something to be taken for
 "the brain and nerves, and as a cure for neurasthenia.
 "' Anti-neurasthin ' it is called, and the box contains the
 "words on two sides of it, ' Prescribed by eminent physicians.'
 "I think the fair interpretation of that description is that
 "it is a medicine and meant to be taken as a medicine
 "between meals, and not that it is a food in any of the
 "ordinary meanings of the word ' food'." That suggests
 the kind of matters one has to take into consideration, and it
 seems to me that everything here indicates that this substance
 is not intended to be used as a drink in the ordinary sense in
 which people understand that expression, but that it is intended
 to be used as a tonic when the need for it is felt in place of some
 other tonic which otherwise might be used. As to this part
 of the definition, the burden is clearly on the defendant
 company to show that a "definite indication " has been given
 that the substance is to be used as a food or a drink. There-
 fore, I make the declaration and grant the injunction for which
 the plaintiffs ask.

Judgment for plaintiffs.

Solicitors for plaintiffs : *Baker & Nairne.*

Solicitors for second defendant : *Thompson, Quarrell & Co.*

Solicitors for defendant company : *Monier-Williams & Milroy.*

J. W. H.

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 Oct. 15.

WRAITH v. FLEXILE METAL COMPANY, LIMITED.

Factory Acts—Dangerous machinery—Failure to fence—Injury to employee—Negligence of employee—Liability of occupier—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 67), s. 14, sub-s. 1; s. 119, sub-ss. 1, 2; s. 130, sub-s. 2.

Occupiers of a factory were charged under s. 14, sub-s. 1, and s. 133 of the Factories Act, 1937, with neglecting securely to fence dangerous machinery in consequence of which an employee suffered bodily injury. Their defence was that the employee

had herself contravened s. 119, sub-ss. 1, 2, of the Act, by ignoring their instructions that employees were not to go near the machinery while it was in motion and creeping under the machinery to retrieve articles which had fallen instead of availing herself of a broom supplied by them for that purpose, or stopping the machinery by a switch; that she had, therefore, "wilfully and "without reasonable cause" done something "likely to endanger" herself and thereby committed an offence under s. 119, sub-s. 2, and s. 130 of the Act; and that that, and not the occupiers' failure to fence, was the cause of the injury:—

Held, that the occupiers' obligation to fence was absolute, and that, as the accident could not have occurred if the machinery had been securely fenced, the charge against the occupiers was established, the guilt or innocence of the employee of an offence under s. 119, sub-s. 2, being irrelevant.

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CASE stated by a metropolitan magistrate.

The respondents, Flexile Metal Co., Ltd., were the occupiers of a factory containing drying ovens at the base of which, about two feet one-and-a-half inches from the floor, was a revolving shaft. Six inches from the end of the shaft a worm was mounted which revolved with the shaft and engaged with a worm wheel. This was a dangerous part of the machinery and was not securely fenced as required by s. 14, sub-s. 1, of the Factories Act, 1937 (1). The ovens were used for drying tubes, and tubes often fell under the ovens. The respondents provided brooms for sweeping up the tubes, and they had instructed their employees not to go near or under the ovens when the machinery was in motion. The machinery could be stopped by a switch. The retrieving of fallen tubes was not an urgent matter. On September 3,

(1) By Factories Act, 1937, s. 14, sub-s. 1: "Every dangerous part of any machinery . . . shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced . . ."

By s. 119, sub-s. 1: ". . . where any means or appliance for securing . . . safety is provided for the use of any [employee] . . . he shall use the means or appliance." Sub-s. 2: "No person employed in a factory . . . shall wilfully and without

"reasonable cause do anything likely to endanger himself or others."

By s. 130, sub-s. 2: "In the event of a contravention by an employed person of the provisions of Part X. [s. 119] of this Act with respect to duties of persons employed . . . that person shall be guilty of an offence and the occupier or owner, as the case may be, shall not be guilty of an offence in respect of that contravention unless it is proved that he failed to take all reasonable steps to prevent the contravention."

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1941, an employee, Vera Madeline Wilson, was injured by the machinery while she was creeping under an oven to retrieve a tube, and a charge was preferred by the appellant, a factory inspector, against the respondents under s. 14, sub-s. 1, of the Act, alleging that they had failed securely to fence the machinery in consequence of which a person had suffered bodily injury within s. 133 of the Act. The magistrate expressed the opinion that the employee "had . . . failed to use "means and appliances provided for her safety, that [she] "had wilfully and without reasonable cause done an act likely "to endanger herself in crawling . . . under the oven whilst "the machinery was in motion, that [she] had acted in contra- "vention of the provisions of s. 119, and that it was not "proved that the respondents had failed to take all reasonable "steps to prevent the said contravention in accordance with the "provisions of s. 130." He, accordingly, dismissed the charge against the respondents. The appellant appealed.

Beecroft for the appellant. The obligation to fence securely is absolute. It may be that the employee did commit a breach of s. 119, sub-ss. 1, 2, of the Act, but that fact is irrelevant. The accident would not have happened if the machinery had been securely fenced.

Vick K.C. and *Moelwyn Hughes* for the respondents. Machinery is only dangerous if it is a possible cause of injury to anybody acting in a way in which a human being may be reasonably expected to act : per du Parcq J. in *Walker v. Bletchley Flettons, Ltd.* (1). The employee in the present case did not so act, but she was guilty of a criminal offence under s. 130, sub-s. 2. Her injury was caused, not by a contravention of the Act by the respondents, but by a contravention of it by herself.

Beecroft replied.

VISCOUNT CALDECOTE C.J. The Factories Act, 1937, by s. 14, sub-s. 1, provides that every dangerous part of any machinery shall be securely fenced. This machinery was not securely fenced, but it was contended on behalf of the respondents that the requirements of s. 133 of the Act were not satisfied, it being necessary under that section before the occupier of a factory can be ordered to pay the fine imposed by the section, to show that a person has suffered "bodily injury, in consequence "of the occupier . . . having contravened [a] provision of

(1) [1937] 1 All E. R. 170, 175.

"this Act." Can it be said that the injury suffered by the employee was not the consequence of the failure of the respondents securely to fence the machinery? In my judgment, it is plain beyond argument that the employee suffered the bodily injury which she did in consequence of that failure. It is impossible to guarantee that workers will not be both foolish and reckless and the object of the Factories Act, 1937, is to protect them against their own folly and carelessness. I, therefore, think that the magistrate was wrong in considering whether or not the employee had herself committed an offence. All he had to decide was whether the respondents had committed an offence by failing securely to fence the machinery. That he has found against them, and, since it appears that the employee's bodily injuries were due to that failure, the magistrate should have recorded a conviction against the respondents.

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TUCKER J. I agree.

CASSELS J. I agree.

Appeal allowed.

Solicitor for appellant: *Treasury Solicitor.*

Solicitors for respondents: *Freeman, Haynes & Co.*

W. L. L. B.

HOLLINGTON v. F. HEWTHORN AND COMPANY, LIMITED, AND ANOTHER.

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Oct. 22.

Evidence — Admissibility — Conviction — Motor-cars in collision — Negligence alleged against defendant driver—Evidence of conviction of defendant driver of careless driving—Res inter alios acta—Statement by person interested—Death of driver of plaintiff's car after action brought—Evidence of statement made by driver of plaintiff's car to police on day of collision—"Statement made . . . at a time "when proceedings were pending or anticipated"—Evidence Act, 1938 (1 & 2 Geo. 6, c. 28), s. 1, sub-s. 3.

In an action arising out of a collision between two motor-cars on the highway in which the plaintiff alleged negligence on the part of the defendant driver the plaintiff sought to give evidence of—(a) a conviction of the defendant driver of careless driving, contrary to s. 12 of the Road Traffic Act, 1930, at the time and place of

Reported by C. G. Moran, Esq., Barrister-at-Law.

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the collision, and (b) of a statement made to the police by the driver of the plaintiff's car (who had died after action brought) on the day of the collision :—

Held, (1.) that evidence of the conviction was inadmissible as being *res inter alios acta*; (2.) that s. 1, sub-s. 3, of the Evidence Act, 1938, which provides: "Nothing in this section shall render" admissible as evidence any statement made by a person interested, "at a time when proceedings were pending or anticipated, "involving a dispute as to any fact which the statement might "tend to establish," is to be interpreted as meaning that a statement is inadmissible where it has been made in such circumstances that proceedings might reasonably be apprehended; that when the plaintiff's driver made the statement he might reasonably have apprehended that either criminal or civil proceedings might follow, and, therefore, that his statement was inadmissible.

Statement by Goddard L.J. in *Robinson v. Stern* [1939] 2 K. B. 260, 269, applied.

ACTION tried by Hilbery J.

The plaintiff, Robert Henry Hollington, the owner of a motor-car, sued as the administrator of the estate of Basil Thomas Edmund Hollington, who had died after action brought, and on his own behalf, claiming damages in respect of a collision which occurred at Abridge, Essex, on April 5, 1940, between the plaintiff's car, driven by B. T. E. Hollington, and a car owned by the first defendants, F. Hewthorn & Co., Ltd., and driven by the second defendant, Ernest Arthur Poll. The defendants denied negligence on the part of the second defendant and pleaded contributory negligence.

Levy K.C. and *H. S. Simmons*, for the plaintiff, stated that no known person had seen the collision other than the two drivers, and tendered in evidence a conviction of the second defendant at Epping petty sessions on May 3, 1940, of careless driving, contrary to s. 12 of the Road Traffic Act, 1930, at the time and place alleged in the statement of claim as the occasion of the negligence of that defendant.

Casswell K.C. and *Holroyd Pearce* for the defendants. Evidence of this conviction is inadmissible, as being *res inter alios acta*: *Rex v. Warden of the Fleet* (1).

[HILBERY J. The authorities on the point are collected in the following passage in Roscoe's Evidence in Civil Actions, 20th ed., p. 209: "As a general rule the record of a conviction "is inadmissible as evidence of the same fact coming into "controversy in a civil suit. *Gibson v. M'Carty* (2), *March v.*

(1) (1700) 12 Mod. Rep. 339. (2) (1735) Cas. temp. Hardw. 311.

"*March* (1), *Castrique v. Imrie* (2) per Blackburn J. In many of the earlier cases the conviction was held inadmissible by reason of the evidence on which it was procured . . . But the conviction was also inadmissible on the ground that it was *res inter alios acta*. See *Gibson v. M'Carty* (3) and *Peake Ev.*, 41 et seq. In *re Crippen* (4) appears at variance with the above cases. There Evans P. admitted in probate proceedings a certified copy of the conviction of a husband for the murder of his wife, as evidence not only of the fact of the conviction, but also as *prima facie* evidence of the commission of the crime. But there the conviction was admitted, as against the claim of the representative of the convicted felon, to enforce rights accruing to the felon from the commission of the very crime of which he was convicted; the position was the same as if the felon himself were claiming. In those circumstances the Court treated the case not as *res inter alios acta*. See also *Prince of Wales, etc., Association v. Palmer* (5)."]

Levy K.C. The law is not correctly stated in the passage cited from Roscoe's Evidence. The evidence of this conviction is both admissible and relevant. It is not conclusive, but *prima facie* evidence of the negligence of the second defendant which is alleged in the statement of claim. In *In re Crippen* (6), Evans P. said: "If it be that the rules of evidence ever were as contended for the executrix in this regard"—the defendants' contention here—"I think, in the circumstances attending trials for crimes in these days, that they ought to be reconsidered and revised": see also *O'Toole v. O'Toole* (7). In *Mash v. Darley* (8), affirmed on other grounds (9), Ridley J. held that the principle laid down in *In re Crippen* (6) applied generally.

Casswell K.C., in reply, referred to *Barnett v. Cohen* (10), *Bird v. Keep* (11), *Rex v. General Medical Council. Ex parte Spackman* (12), and Phipson on Evidence, 8th ed., p. 407.

HILBERY J. I rule that evidence of this conviction is inadmissible, as being *res inter alios acta*.

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| (1) (1858) 28 L. J. (P. & M.) 30. | (7) (1926) 42 T. L. R. 245. |
| (2) (1870) L. R. 4 H. L. 434. | (8) [1914] 1 K. B. 1. |
| (3) (1735) Cas. temp. Hardw. 311. | (9) [1914] 3 K. B. 1226. |
| (4) [1911] P. 108. | (10) [1921] 2 K. B. 467. |
| (5) (1858) 25 Beav. 605. | (11) [1918] 2 K. B. 692. |
| (6) [1911] P. 115. | (12) [1942] 2 K. B. 261. |

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Levy K.C. then tendered in evidence under s. 1 of the Evidence Act, 1938, a statement made by B. T. E. Hollington to the police on the day of the collision.

Casswell K.C. This statement is inadmissible by the terms of s. 1, sub-s. 3, of the Evidence Act, 1938. B. T. E. Hollington was a person interested, his statement involved facts in dispute which it might tend to establish, and it was made at a time when proceedings must have been "anticipated."

Levy K.C. At the time when this statement was made to the police no mention of either criminal or civil proceedings had been made. By the terms of the sub-section the proceedings "anticipated" must involve a dispute as to some fact which the statement might tend to establish; but here there had been no dispute, and without some indication, however slight, of the institution of proceedings, there could not have been a dispute. In *Robinson v. Stern* (1), the defendant was cautioned by a police constable before she made her statement, and the Court of Appeal held that after such a caution she must have "anticipated" the possibility of proceedings being taken against her. On that ground only the defendant's statement was held to have been inadmissible.

HILBERY J. In my judgment s. 1, sub-s. 3, of the Evidence Act, 1938, precludes my admitting this statement.

That decision depends on the interpretation which I put on the word "anticipated," in the sub-section, and I have before me the observations made by Goddard L.J. in *Robinson v. Stern* (2). The statement in that case, which was held to be inadmissible, was made in circumstances which differed from those of the present matter, because an actual warning had been given by the police to the person who made the statement in terms which must necessarily have brought to her mind that proceedings were likely to follow. The giving of that caution was said by Goddard L.J. to be tantamount to telling the person who made the statement: "You need say nothing, and, if you do say anything, mind you do not incriminate yourself." The lord justice continued: "It seems to me that that is very far from saying in those circumstances that 'a person's mind 'stands in an even position without any 'temptation to exceed or fall short of the truth.' When 'considering the admissibility of evidence which is made 'admissible by this statute and the restrictions upon its 'admissibility imposed by this statute, one has to see that one

(1) [1939] 2 K. B. 260.

(2) *Ibid.* 269.

"is not giving some wider interpretation to the Act than the language bears ; but I think that when one is considering these words ' when proceedings were pending or anticipated ' —and the case to which I have referred of *Butler v. Viscount Mountgarret* (1) shows that ' anticipated ' does not necessarily mean an immediate proceeding or a threatened proceeding—"the judgment which I have read of Lord Eldon is most helpful."

It appears to me that the sub-section is to be interpreted as meaning that a statement is inadmissible where it has been made in such circumstances that proceedings might reasonably be apprehended, and, as Wills J. observes in *Collins v. London General Omnibus Co.* (2) : "The supposition to be derived from "such an occurrence"—that is a collision on the road with consequent personal injuries to someone—"is that an action, "or a claim involving an action, if disputable, was as near a "moral certainty as is possible. . . . It is immaterial, that is to "say, at what time the action is or is not actually in existence." Where a collision between vehicles on the highway occurs, resulting in injury to a person, any driver of one of the vehicles knows that the police will consider a statement which he makes to them for the purpose of deciding whether or not they will take criminal proceedings, and any such driver, it seems to me, must anticipate when he makes a statement that such proceedings may be taken. In those circumstances, it seems to me also, more especially now that there is compulsory insurance, that any such driver must anticipate that civil proceedings may be taken against him to recover damages for injuries which the person injured has sustained, or, at any rate, those sums which an insurance company may have had to pay to the person injured as a result of the accident. Every citizen knows that insurance is a matter of business, and that an insurance company, having to indemnify its assured, has a right of subrogation and can claim to stand in the shoes of its assured and recover what it has been obliged to pay him under the policy. In the circumstances, I feel myself precluded by s. 1, sub-s. 3, of the Law of Evidence Act, 1938, from admitting this statement, and, in doing so, I consider I am following the indication given by Goddard L.J. in his judgment in *Robinson v. Stern* (3).

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& Co.

Hilbery J.

Solicitors for plaintiff : *Leader, Henderson & Leader.*

Solicitor for defendants : *P. A. Gascoin.*

(1) (1859) 7 H. L. C. 633.

(3) [1939] 2 K. B. 260, 269.

(2) (1893) 63 L. J. (Q. B.) 428, 429.

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Oct. 22.

SAWYER AND VINCENT v. WINDOW BRACE, LIMITED.

Mistake—Money paid under mistake of law—Threat of legal proceedings—Recovery.

The defendants were tenants from the plaintiffs of premises in respect of which they had paid rent in advance. On October 14, 1940, the premises were rendered unfit by enemy action. On October 29, 1940, the defendants served notice of disclaimer under s. 4 of the Landlord and Tenant (War Damage) Act, 1939, and under s. 8 of that Act the lease was deemed to be surrendered as from that date. After the passing of the Landlord and Tenant (War Damage) (Amendment) Act, 1941, the defendants claimed, under s. 13 of that Act, the repayment of an apportioned part of the rent, and, in default of payment, threatened to institute proceedings to recover the money. The plaintiffs then repaid the amount claimed. In January, 1942, Stable J. held in *London Fan and Motor Co., Ltd. v. Silverman* [1942] W. N. 56, that s. 13 of the Act of 1941 was not retrospective, and the plaintiffs now sought to recover from the defendants the amount repaid :—

Held, that, assuming the decision of Stable J. to be right, the plaintiffs had made the repayment to the defendants under a mistake of law, and even if it had been made under the threat of legal proceedings by the defendants it was not made under compulsion and was therefore not recoverable.

ACTION tried by Croom-Johnson J.

The plaintiffs, Carl Hermann Sawyer and Charles Howard Vincent, were the landlords, and the defendants, Window Brace, Ltd., were the tenants from year to year, under two agreements dated August 24, 1940, of the west and east wings of the ground floor of 60 Arlington Road, Camden Town, at the yearly rents of 275*l.* for the west wing from September 29, 1940, and of 200*l.* for the east wing from October 24, 1940. The defendants paid in advance 275*l.*, one year's rent of the west wing, and 50*l.*, one quarter's rent of the east wing. On October 14, 1940, both wings were so damaged by enemy action as to be unfit within the meaning of the Landlord and Tenant (War Damage) Act, 1939. On October 29 the defendants gave notice of disclaimer of the leases under s. 4 of that Act, and, by s. 8, the leases were deemed to have been surrendered as from that date. On August 7, 1941, the Landlord and Tenant (War Damage) (Amendment) Act, 1941, came into force, and on October 7, 1941, the defendants demanded from the plaintiffs under s. 13 of that Act (1) the

(1) Landlord and Tenant (War s. 13: "Where (a) any lease is Damage) (Amendment) Act, 1941, "deemed to have been sur-

repayment of 252*l.* 8*s.* and 47*l.* 5*s.* 2*d.*, being the amounts paid by them in excess of the apportionable parts of the rents to October 29, 1940. The plaintiffs did not comply with the demand and correspondence ensued between the solicitors of the parties. On November 14, 1941, the defendants' solicitors wrote: "In reply to your letter of yesterday" [which had expressed doubt as to the retrospective effect of s. 13] "counsel advises us definitely that the provision in the Act is retrospective. We shall be glad to hear whether or not you will advise your clients that the claim should be met, as we are instructed to press this matter." On November 24 they wrote: "Not having heard from you in reply to our last letter of the 14th of this month, we are now issuing proceedings, and shall be glad to hear if you will accept service." On November 27 the plaintiffs paid the amount claimed by the defendants. On January 14, 1942, in *London Fan and Motor Co., Ltd. v. Silverman* (1) Stable J. held that s. 13 of the Act of 1941 was not retrospective, and on January 19 the plaintiffs requested the return of the sums repaid by them to the defendants. That demand being refused, the plaintiffs began this action claiming 299*l.* 13*s.* 2*d.*, as money received to the use of the plaintiffs. The defendants admitted the facts, but said that they disclosed no cause of action.

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Squibb for the plaintiffs. It is submitted that the decision of Stable J. in *London Fan and Motor Co., Ltd. v. Silverman* (1) is right and should be followed. If so, the plaintiffs' payment was made under a mistake of law. Admittedly, a payment so made cannot be recovered unless made under compulsion, and here the threat of legal proceedings was sufficient compulsion to make it recoverable. [He cited *Henderson v. Folkestone Waterworks Co.* (2), *North and Millhouse v. Walthamstow U. D. C.* (3).]

Safford for the defendants. When money is paid under a

" rendered by virtue of s. 8 of the
" principal Act (which relates to
" the effect of a notice of dis-
" claimer) . . . the rent pay-
" able in respect of the period
" during which the surrender
" takes effect . . . shall be appor-
" tionable, whether the rent under
" the lease is payable in advance
" or otherwise, and any rent paid

" by the tenant in respect of that
" period in excess of the amount
" apportionable to the part of the
" period preceding the date on
" which the surrender takes effect
" shall be recoverable by him."

(1) [1942] W. N. 56 ; 58 T. L. R.
119.

(2) (1885) 1 T. L. R. 329.

(3) (1898) 15 T. L. R. 6.

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mistake of law, the compulsion required to make it recoverable must be duress of person or of goods. A mere threat of proceedings—certainly, of civil proceedings—is not compulsion. *Maskell v. Horner* (1) exactly covers this case, and the statement of the law there is borne out by the earlier cases. [He referred to *Marriot v. Hampton* (2); *Rogers v. Ingham* (3), *Brown v. M'Kinally* (4).] A payment is none the less made voluntarily because it is made under the threat of proceedings. If the payer thinks it is not legally due his proper course is to defend the proceedings, in which the plaintiff is only threatening to enforce his legal rights.

[CROOM-JOHNSON J. If you are right on this point, does it not become unnecessary for me to decide whether I agree with Stable J.'s view of s. 13?]

Yes, that is why I argued the question of compulsion first, but if your Lordship is against me on that I am prepared to argue that the decision in *London Fan and Motor Co., Ltd. v. Silverman* (5) was wrong, and should not be followed. [He was not called on on that point.]

Squibb in reply. The dicta of Lord Reading C.J. in *Maskell v. Horner* (1) were obiter and should not be followed in face of the decision of Channell J. in *North and Millhouse v. Walthamstow U. D. C.* (6).

[CROOM-JOHNSON J. Have you considered *Moore v. Fulham Vestry*? (7). If the actual issuing of legal process does not make the payment compulsory, is it not a fortiori that a mere threat of proceedings cannot do so?]

CROOM-JOHNSON J. That a voluntary payment made under a mistake of law cannot be recovered is, I should have thought, beyond argument at this period in our legal history, and although I have had some authority cited to me, I do not propose to say anything about it beyond referring to *Henderson v. Folkestone Waterworks Co.* (8). The only authority which has been cited to me in support of the proposition that a threat of proceedings is sufficient to prevent a payment being voluntary is *North and Millhouse v. Walthamstow U. D. C.* (6), where the plaintiff had received a notice from the district inspector of nuisances of the local authority calling on him

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| (1) [1915] 3 K. B. 106. | (5) [1942] W. N. 56; 58 T. L. R. 119. |
| (2) (1797) 7 Term Rep. 269. | (6) (1898) 15 T. L. R. 6. |
| (3) (1876) 3 Ch. D. 351. | (7) [1895] 1 Q. B. 399. |
| (4) (1795) 1 Esp. 279. | (8) (1885) 1 T. L. R. 329. |

to abate a nuisance on certain premises. The question was raised whether the premises were drained by a combined operation, in which case the liability to repair was on the owners or occupiers of the premises, or whether the line of pipes was a sewer, in which case it was repairable by the district council. Acting on the notices and threat of proceedings given by the inspector, the plaintiff put the repairs in hand, paid the bill and then brought an action against the urban district council, contending that the pipes constituted a sewer, which they were liable to maintain, and that he had been obliged to pay that which they were liable in law to pay. Channell J., on the facts of the case, came to the conclusion that the plaintiff had made out a good cause of action and gave judgment against the local authority. That obviously was a claim to recover an amount paid to a third party which the plaintiff said he had been compelled to pay and which the defendants were legally liable to pay. A very different class of claim from the present one. The plaintiffs' counsel in the present case seeks to use that to show that, wherever there is a threat of proceedings in totally different circumstances, even where money has been paid over to the defendants, there is enough to prevent it being a voluntary payment. I asked him for any other case which supported that wider proposition, but none was forthcoming, and, indeed, I am not surprised. It has long since been held that if a man pays a claim which is made upon him and it turns out that he was not legally liable to pay it, he cannot recover back the money, there being no mutual mistake, no fraud and no ground in equity for giving relief. Without overloading this judgment with citations, I think I need do no more than remind myself of the decision in *Marriot v. Hampton* (1), where Lord Kenyon said: "After a recovery "by process of law there must be an end of litigation, otherwise "there would be no security for any person." Counsel for the plaintiff does not really dispute that proposition but he says this distinction has to be drawn: If proceedings are started and the defendant pays the claim, that is something which, under the authorities, makes it impossible for him to bring an action subsequently and say that he had made a mistake or had reserved his rights and was entitled to have his money back. But, if a payment is made at an earlier date, before legal proceedings have been started, though they are threatened, the position is different, and by that easy means Mr. Squibb

(1) 7 Term Rep. 269.

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gets rid of such cases as *Brown v. M'Kinally* (1) and the statements of law by James and Mellish L.JJ. in *Rogers v. Ingham* (2). I can find no authority for this remarkable distinction. It sounded to me when I heard it advanced, and it sounds to me still, like an attempt to argue that on this particular branch of the law not only does the greater not include the less but the less excludes the greater. I think that the observations in the judgment of the Court of Appeal in *Maskell v. Horner* (3), even though it is possible that they are obiter, and the statements in *Moore v. Fulham Vestry* (4) are sufficient to show that the principle is still the same as in *Marriot v. Hampton* (5), namely, that it is to the interest of the public that there should be an end of litigation.

I am far from satisfied, on the facts of this case, that there ever was a payment made as the result of the threats contained in the letters of November 14 and November 24, 1941. I have assumed it for the purpose of this judgment as the facts and documents are admitted. I have heard no evidence, but it looks to me on the letters that the payment is just as likely to have been made by reason of the solicitors for the plaintiffs having been persuaded by the letters of the solicitors for the defendants that the advice of their counsel was right, and that their law was right, and, accordingly, that the payment was rightfully claimed. In these circumstances I think this action fails and there must be judgment for the defendants, with costs.

Judgment for defendants.

Solicitors for plaintiffs : *Harris, Chetham & Co.*

Solicitors for defendants : *Underwood & Co.*

(1) 1 Esp. 279.

(2) 3 Ch. D. 351, 355, 357.

(3) [1915] 3 K. B. 106.

(4) [1895] 1 Q. B. 399.

(5) 7 Term Rep. 269.

J. W. H.

J. H. RAYNER AND COMPANY, LIMITED *v.* HAMBRO'S
BANK, LIMITED.

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Oct. 22, 23.

*Banker—Confirmed credit—Discrepancy between credit and documents
in description of goods—Duty of banker.*

A bank received instructions from a customer to open a confirmed credit in favour of the plaintiffs covering a cargo of "Coromandel groundnuts." The bank opened the credit and notified the plaintiffs that it was available against invoice and bills of lading for "Coromandel groundnuts." The plaintiffs presented bills of lading for "machine-shelled groundnut kernels" accompanied by an invoice for "Coromandel groundnuts." The bank refused payment, and the plaintiffs sued them for breach of the undertaking in the letter of credit. Evidence was accepted by Atkinson J. that "machine-shelled groundnut kernels" were, and were universally understood in the trade to be, identical with "Coromandel groundnuts." He gave judgment for the plaintiffs, and the bank appealed:—

Held, reversing Atkinson J. that where the customer of a bank instructs the bank to open a credit, the bank acts at its peril if it departs from the precise terms of the mandate, and that, therefore, the action failed.

English, Scottish and Australian Bank, Ltd. v. Bank of South Africa (1922) 13 Ll. L. Rep. 21, and *Equitable Trust Co. of New York v. Dawson Partners, Ltd.* (1927) 27 Ll. L. Rep. 49 applied.

Held, further, that a bank is under no duty to know the trade customs and trade terms of its customers.

APPEAL from Atkinson J.

On March 29, 1940, the defendants, Hambro's Bank, Ltd., received a cable from correspondents in Denmark, which was not then in enemy occupation, requesting them to open an irrevocable sight credit expiring June 1, 1940, in favour of J. H. Rayner & Co., the plaintiffs. The material words of the mandate contained in this cable were: "account Aarhus "Oliefabrik for about 16,975*l.* against invoice full set straight "clean bills of lading to Aarhus Oliefabrik dated Madras "during April, 1940, covering about 1400 tons Coromandel "groundnuts in bags at 12*l.* 2*s.* 6*d.* per ton f.o.b. Madras "shipment motorship *Stensby* to Aarhus." On April 1, the defendants issued a letter of credit to the plaintiffs in these terms: "Confirmed credit No. 14597. We beg to inform you "that a confirmed credit has been opened with us in favour of "yourselves for an amount of up to about 16,975*l.* account of "Aarhus Oliefabrik available by drafts on this bank at sight

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"to be accompanied by the following documents—invoice, "clean on board bills of lading in complete set issued to order "Aarhus Oliefabrik, dated Madras during April, 1940, covering "a shipment of about 1400 tons Coromandel groundnuts in "bags at 12*l.* 2*s.* 6*d.* per ton f.o.b. Madras per m.s. *Stensby* "to Aarhus. This credit is valid until June 1, 1940. All "drafts drawn hereagainst must contain the clause 'Drawn "under confirmed credit No. 14597.' We undertake to "honour drafts on presentation, if drawn in conformity with "the terms of this credit." On April 15, the plaintiffs presented to the defendant bank a draft, accompanied by an invoice of the same date for "17,724 bags Coromandel ground- "nuts. Bill of lading dated 2.4.40 " and three bills of lading, differing only as to the number of bags, which totalled 17,724, in each of which the goods were described in these terms: In the margin were the marks "O.T.C. C.R.S. "Aarhus," and in the body of the bill ". . . bags machine- "shelled groundnut kernels, each bag said to weigh 177 lb. "nett. Country of origin, British India. Country of final "destination, Denmark. Goods are Danish property." Those documents having been presented to the defendants, they refused to accept the draft, on the ground that the terms of the letter of credit called for an invoice and bill of lading both covering a shipment of "Coromandel groundnuts " whereas the bills of lading presented described the goods as "machine- "shelled groundnut kernels. Country of origin, British "India." The plaintiffs thereupon brought this action, alleging that the defendants' refusal to honour their draft was wrongful, and a breach of the undertaking in the letter of credit. At the trial before Atkinson J. evidence was given and accepted by him that "machine-shelled groundnut "kernels " were the same commodity as "Coromandel ground- "nuts " and would be universally understood to be so in the trade in London, and, further, that the marginal mark "C.R.S." was short for "Coros " or "Coromandels " and would be so understood in the trade. Atkinson J. gave judgment for the plaintiffs, and the defendants appealed.

Paull K.C. and *Scott Cairns* for the defendant bank. The judge appears to have been unduly influenced by the fact that the shipment was in fact Coromandel groundnuts. That fact is immaterial, because what the banker has to pay against is the documents specified by the letter of credit. In the

words of Bowen L.J. in *Sanders v. Maclean* (1), the bill of lading "is a key which in the hands of a rightful owner is intended to "unlock the door of the warehouse, floating or fixed, in which "the goods may chance to be." The bank knows nothing officially of the transaction between consignor and consignee : see per Warrington L.J., in *Stein v. Hambro's Bank of Northern Commerce* (2). There is nothing in the present case to show that the bank had knowledge of the particular trade. There was a clear discrepancy between the invoice and the bill of lading and the bank was entitled to refuse payment. [They also relied on *Hansson v. Hamel & Horley, Ltd.* (3); *Guaranty Trust of New York v. Van den Berghs, Ltd.* (4); and distinguished *Société Metallurgique v. British Bank for Foreign Trade* (5).]

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Sir Robert Aske K.C. and *Valentine Holmes* for the plaintiffs. If documents are presented in the form customary in the shipping trade, namely, between the buyer and seller and the ship, and containing material customary in the trade, they are good and sufficient tender under a letter of credit. After all, the bill of lading is the contract of the shipowner for the carriage of the goods, and in it the shipowner accepts no responsibility for any of the detailed characteristics of the goods. If it be the practice of the trade on shipment of goods to describe those goods as so many bags of merchandise, that would be a perfectly good description, so far as the bill of lading is concerned, for tender under a letter of credit. If, for instance, the terms of a letter of credit called for the presentation of invoice and bill of lading covering a shipment of so many bags of Demerara sugar, and if it were the custom of the trade to ship sugar under the designation of so many bags of merchandise, then, if there is tendered an invoice for so many tons of Demerara sugar at a contract price, and bills of lading for so many bags of merchandise, that would be a good tender under the letter of credit. Otherwise it would be exceedingly difficult to deal with banker's credits. All that is required is documents in the customary form, and in the present case these documents did in fact cover 1400 tons of Coromandel groundnuts. If the bank wants a particular description it must stipulate for it.

MACKINNON L.J. The legal result of a banker issuing a

- (1) (1883) 11 Q. B. D. 327, 341. (4) (1925) 22 Ll. L. Rep. 446, 454.
(2) (1922) 10 Ll. L. Rep. 529, 531. (5) (1922) 11 Ll. L. Rep. 168, 169.
(3) [1922] 2 A. C. 36, 46.

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letter of credit has been considered in various cases to which I do not think it is necessary to refer, but two passages which have been mentioned by Goddard L.J., seem to me to sum up the position in general terms with the greatest accuracy. In *English, Scottish and Australian Bank, Ltd. v. Bank of South Africa* (1), Bailhache J. said: "It is elementary to say that a person who ships in reliance on a letter of credit must do so in exact compliance with its terms. It is also elementary to say that a bank is not bound or indeed entitled to honour drafts presented to it under a letter of credit unless those drafts with the accompanying documents are in strict accord with the credit as opened." And Lord Sumner in *Equitable Trust Co. of New York v. Dawson Partners, Ltd.* (2) said: "It is both common ground and common sense that in such a transaction the accepting bank can only claim indemnity if the conditions on which it is authorized to accept are in the matter of the accompanying documents strictly observed. There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines. The bank's branch abroad, which knows nothing officially of the details of the transaction thus financed, cannot take upon itself to decide what will do well enough and what will not. If it does as it is told, it is safe; if it declines to do anything else, it is safe; if it departs from the conditions laid down, it acts at its own risk." The defendant bank were told by their Danish principals to issue a letter of credit under which they were to accept documents—an invoice and bills of lading—covering "Coromandel groundnuts in bags." They were offered bills of lading covering "machine-shelled groundnut kernels." The country of origin was stated to be British India. The words in that bill of lading clearly are not the same as those required by the letter of credit. The whole case of the plaintiffs is, in the words of Lord Sumner, that "they are almost the same, or they will do just as well." The bank, if they had accepted that proposition, would have done so at their own risk. I think on pure principle that the bank were entitled to refuse to accept this sight draft on the ground that the documents tendered, the bill of lading in particular, did not comply precisely with the terms of the letter of credit which they had issued.

Atkinson J., however, in his judgment says: "A sale of

(1) (1922) 13 Ll. L. Rep. 21, 24. (2) (1927) 27 Ll. L. Rep. 49, 52.

"Coromandel groundnuts is universally understood to be a sale of machine-shelled kernels, that is, dry decorticated, and there is a standard form of contract, No. 37, used in the trade. The marking C.R.S. is short for 'Coros,' which is itself an abbreviation for 'Coromandels.' If a bag of kernels is marked 'C.R.S.,' it means that it is a bag of Coromandel groundnuts." That is stating the effect of evidence given by persons who deal in groundnuts in Mincing Lane, and when Atkinson J. says that it is "universally understood," he means that these gentlemen from Mincing Lane have told him: "We dealers in Mincing Lane all understand these things. We understand that 'Coromandel groundnuts' are machine-shelled groundnut kernels, and we understand when we see 'C.R.S.' that that means 'Coromandels.'" It is suggested that as a consequence the bank, when this bill of lading for machine-shelled groundnut kernels with C.R.S. in the margin was brought to them, ought to be affected with this special knowledge of those witnesses who deal in these things on contracts in Mincing Lane. I think that is a perfectly impossible suggestion. To begin with, this case does not concern any transaction in Mincing Lane. It is a transaction with Denmark, and for aught I know, and for aught the evidence proved, the people in Denmark know nothing about this business usage of Mincing Lane. Moreover, quite apart from that special application of the relevant considerations, it is quite impossible to suggest that a banker is to be affected with knowledge of the customs and customary terms of every one of the thousands of trades for whose dealings he may issue letters of credit. A homely illustration is suggested by the books in front of me. If a banker were ordered to issue a letter of credit with respect to the shipment of so many copies of the "1942 Annual Practice" and were handed a bill of lading for so many copies of the "1942 White Book," it would be entirely beside the mark to call a lawyer to say that all lawyers know that the "1942 White Book" means the "1942 Annual Practice." It would be quite impossible for business to be carried on, and for bankers to be in any way protected in such matters, if it were said that they must be affected by a knowledge of all the details of the way in which particular traders carry on their business. [His Lordship dealt with certain other contentions of the plaintiffs which do not call for a report.] For these reasons, I think that this appeal succeeds, that the judgment in favour of the plaintiffs must be

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C. A. set aside, and judgment entered for the defendants with costs,
1942 here and below.

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GODDARD L.J. I agree. It seems to me that Atkinson J. has based his judgment on the consideration that the bank was affected in some way by this custom of the trade, and, secondly, that he has considered whether what the bank required was reasonable or unreasonable. I protest against the view that a bank is to be deemed affected by knowledge of the trade of its various customers, but, quite apart from that, even if the bank did know of this trade practice by which "Coromandel groundnuts" can be described as "machine-shelled groundnut kernels," I do not think that would be conclusive of the case.

There are three parties concerned in a banker's credit—the person who requests the bank to establish the credit, the bank which establishes it, and the beneficiary who can draw on it. The person who requests the bank to establish the credit can impose what terms he likes. If he says to the bank: "I want a bill of lading in a particular form," he is entitled to it. If the bank accepts the mandate which its customer gives it, it must do so on the terms which he imposes. The bank, as between itself and the beneficiary can impose extra terms if it likes. For instance, in this case, the bank imposes a term: "All drafts drawn hereagainst must contain the clause: 'Drawn under confirmed credit 'No. 14597.''" The bank can say to the beneficiary: "These are the terms on which the bank will pay," and if it has only been authorized by its customer to pay on certain terms it must see that those terms are included in the notification which it gives to the beneficiary, and it must not pay on any other terms. If it does pay on any other terms, it runs the risk of its customer refusing to reimburse it. It does not matter whether the terms imposed by the person who requires the bank to open the credit seem reasonable or unreasonable. The bank is not concerned with that. If it accepts the mandate to open the credit, it must do exactly what its customer requires it to do. If the customer says: "I require a bill of lading for Coromandel groundnuts," the bank is not justified, in my judgment, in paying against a bill of lading for anything except Coromandel groundnuts, and it is no answer to say: "You know perfectly well that 'machine-shelled groundnut kernels are the same as Coromandel groundnuts.''" For all the bank knows, its customer may have a particular reason for

wanting "Coromandel groundnuts" in the bill of lading. At any rate, that is the instruction which the customer has given to the bank, and if the bank wants to be reimbursed and remunerated by its customer, it must show that it has performed his mandate. If I employ someone at a remuneration to pay money for me on getting a receipt in a particular form and he pays the money without getting the receipt in that form, he has not carried out the duty which I imposed on him. It would be no answer for him to say: "Well, I got a receipt which in fact gives you all reasonable protection." My answer to that would be: "You are not concerned with the protection which you have given me. You are concerned to carry out the orders which I gave you, and you have not done it."

In my opinion, in this case, whether the bank knew or did not know that there was this trade practice to treat "Coromandel groundnuts" and "machine-shelled groundnut kernels" as interchangeable terms, is nothing to the point. They were told to establish a credit, and to pay against a bill of lading describing particular goods, and the beneficiary under that credit presented a bill of lading which was not what they had promised to pay against. Therefore, it seems to me, whether it is reasonable or unreasonable for their principals to say that they want a bill of lading for "Coromandel groundnuts," or whether the bank had or had not knowledge of some of the trade practices which are referred to, is not the question. The question is "What was the promise which the bank made to the beneficiary under the credit, and did the beneficiary avail himself of that promise?" In my opinion, in the present case, he did not, and, therefore, I think that the bank was justified in refusing to pay. The other matters are, in my opinion, quite irrelevant, though the judge seems to have paid particular attention to them. I agree that this appeal should be allowed.

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Appeal allowed.

Solicitors for bank : *Slaughter & May.*
Solicitors for plaintiffs : *Jaques & Co.*

J. W. H.

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Oct. 29.

BLACKSHAW v. CHAMBERS.

Emergency legislation—Lighting restrictions—Pedal bicycle—Number of lights to be displayed—Lighting (Restrictions) Order, 1940 (St. R. & O., 1940, No. 74), para. 31, sub-para. 1.

By para. 31, sub-para. 1, of the Lighting (Restrictions) Order, 1940, it is provided that during the hours of darkness a pedal bicycle while on the road shall display the lights required by and under the Road Transport Lighting Act, 1927. Sect. 5, sub-s. 1, of the Act provides that, in the case of bicycles not having a sidecar attached thereto, whether propelled by mechanical power or not, only a single lamp showing a white light to the front need be carried instead of the two such lamps required by s. 1, sub-s. 1 (a), of the Act to be carried by other vehicles.

The appellant, while riding a pedal bicycle on the road during the hours of darkness displayed two lamps each showing a white light to the front:—

Held, that the requirement of s. 5, sub-s. 1 (a), of the Act of 1927 was, in the case of pedal bicycles, only one white light showing in front, and the displaying of a second such light was a breach of the order.

CASE stated by Wimbledon justices.

At a sitting of the justices on February 4, 1942, an information was preferred, under para. 1 (b) of the Lighting (Restrictions) Order, 1940 (1), by the respondent, Chambers, a constable of the Metropolitan police, against the appellant, Norman Leslie Blackshaw, for that he, on January 2, 1942, at Merton, Surrey, during the hours of darkness, caused to be displayed a second white front light on a pedal cycle which he was riding on a road, in breach of the order.

On the hearing of the information it was proved or admitted that the appellant was riding a pedal bicycle not propelled by mechanical power and not having a sidecar attached thereto, during the hours of darkness on January 2, 1942, and that he had on the bicycle two separate lamps, each showing a white

(1) Lighting (Restrictions) Order, 1940, para. 1: "During the hours of darkness, it shall not be lawful—(b) for any light to be displayed otherwise than in a roofed building, closed vehicle or other covered enclosure."

Para. 3, sub-para. 1: "Nothing in paras. 1 and 2 of this order shall render unlawful—(a) the display of any light which is required or authorized by or

"under the following provisions of this order."

Para. 31, sub-para. 1: "... a bicycle or tricycle not propelled by mechanical power, whether or not it has a sidecar attached thereto, shall, while on the road during the hours of darkness, display the lights required by and under the Road Transport Lighting Act, 1927, and also a red rear light."

light to the front, and each being an authorized bicycle lamp within the meaning of sub-para. 2 of para. 31 of the Lighting (Restrictions) Order, 1940.

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The justices were of the opinion that the carrying on the bicycle of a second lamp showing a white light to the front was a breach of para. 1 (b) of the order, for the following reasons: "(a) The display of any light otherwise than in a 'roofed building, closed vehicle or other covered enclosure' is unlawful under para. 1 (b) of the said order, except when, 'by virtue of para. 3, sub-para. 1 (a), of the order, such display is required or authorized by or under the subsequent provisions of the order. (b) By para. 31, sub-para. 1, of the order a bicycle not propelled by mechanical power must, while on a road during the hours of darkness, display the lights required by and under the Road Transport Lighting Act, 1927. (c) By the combined effect of ss. 1 and 5 of the Road Transport Lighting Act, 1927 (1), a bicycle not having a sidecar attached need only carry a single lamp showing a white light to the front, and nothing further in this respect can be required. (d) The 'requirement,' therefore, by and under the said Act is a single lamp showing a white light to the front. (e) As the appellant was carrying two lamps, each showing a white light to the front, one of such lamps was in 'excess of 'requirement.' " The justices, accordingly, convicted the appellant and fined him 5s. The appellant appealed.

J. W. Williamson for the appellant. The justices were wrong. Sect. 1, sub-s. 1 (a), of the Act provides that every vehicle on the road shall carry two front lights. True, that s. 5, sub-s. 1 (a), provides that, in the case of a pedal bicycle, only one white light "need be carried," but that is not a fundamental alteration of the requirement contained in s. 1, sub-s. 1 (a), for "every vehicle on any road," but is a concession in the case of pedal bicycles of which advantage need not be

(1) Road Transport Lighting Act, 1927, s. 1, sub-s. 1: ". . . every vehicle on any road shall during the hours of darkness carry— (a) two lamps, each showing to the front a white light visible from a reasonable distance."

Sec. 5, sub-s. 1: "The foregoing provisions of this Act shall apply to bicycles, tricycles

"and invalid carriages, subject to the following modifications:—(a) in the case of bicycles not having a sidecar attached thereto, whether propelled by mechanical power or not . . . only a single lamp showing a white light to the front instead of two such lamps need be carried."

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taken. The word "required" in the order must be regarded as elastic. To decide otherwise would lead to absurd results. For instance, by s. 5, sub-s. 1 (c), of the Act no lamp need be carried on a pedal bicycle which is being wheeled by a person on foot as near as possible to the near or left-hand edge of the carriage-way. If the decision of the justices is right, such a person who, for reasons of safety, switched on his light would be doing something not "required" by the Act, and presumably would be liable to prosecution.

The respondent did not appear and was not represented.

VISCOUNT CALDECOTE C.J. read the provisions of the Lighting (Restrictions) Order, 1940, and the section of the Road Transport Lighting Act, 1927, above set out, and proceeded: The combined effect, therefore, of para. 31, sub-para. 1, of the Lighting (Restrictions) Order, 1940, and s. 5, sub-s. 1 (a), of the Act of 1927, in the case of bicycles, is that only one white light showing in front is to be displayed. The conviction of the appellant under para. 1 (b) of the order is, accordingly, justified, very much for the reasons stated by the justices in their findings. The matter has taken a little time to discuss, because the regulations are undoubtedly puzzling, but if it is borne in mind that you have to look at the Road Transport Lighting Act, 1927, to see what lights are required, you get a clear answer. In my judgment the appeal should be dismissed.

TUCKER J. I agree. I think that the interpretation to be put on this order, coupled with the provisions of the Road Transport Lighting Act, 1927, is that which my Lord has indicated.

Mr. Williamson conceded that that is the correct interpretation if the word "required" in para. 31, sub-para. 1, of the order is given its literal or ordinary meaning, but he argued that, when the order and the Act were regarded as a whole, it was clear that some other interpretation must be given to "required," because otherwise absurd results not contemplated by the legislature would follow. In support of that argument he pointed to s. 5, sub-s. 1 (c), of the Act, which provides that in the case of bicycles not having a sidecar attached thereto, no lamp need be carried if the bicycle is being wheeled by a person on foot as near as possible to the near or left-hand edge of the carriage-way. If, said Mr. Williamson, a man in those circumstances, by way of precaution, or for some other reason, puts on his front light he will be doing

something which is not required by the Act of 1927, and so render himself liable to prosecution under the order. That, it is argued, is an absurdity which must follow from the interpretation put on the word "required" by the justices. If Mr. Williamson had made good that point he might have carried me some way, at any rate, towards adopting a different interpretation of the word than its ordinary literal meaning, but it is sufficient to say that he has not done so. Without giving any decision on the matter, I am, as at present advised, inclined to think that those results, which Mr. Williamson says would be absurd in the case of a bicycle being wheeled near the left-hand edge of the carriage-way, are prevented from following by the provisions of para. 31, sub-para. 3, of the order. Indeed, I am disposed to think that that sub-paragraph was inserted for the very purpose of preventing those results from following. I am not sure that the other members of the court take the same view on this matter, and it is sufficient to say that I am not satisfied that any absurd results will follow from the meaning which we consider it to be natural and proper to give to the word "required."

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CASSELS J. I agree. The appellant's answer to the charge made against him is that he carried and displayed the lights required by s. 1, sub-s. 1 (a), of the Road Transport Lighting Act, 1927, and that the provisions of s. 5, sub-s. 1 (a), of the Act are not strictly requirements which modify the Act in its application to bicycles, but are only concessions. I do not agree that that is the proper interpretation to be placed on the sub-section. I have come to the conclusion that the proper reading of the various provisions is that bicycles are required by s. 5, sub-s. 1 (a), of the Act to carry one white light in front. These are days when the law does not look favourably on the display of unnecessary lights, and, in my opinion, it was broken when the appellant's bicycle was on the road with two lights. I do not deem it necessary, until such a case should arise, to consider whether a cyclist who shows a light when he is wheeling his bicycle as near as possible to the near curb would be regarded as committing an offence.

Appeal dismissed.

Solicitors for appellant : *Oswald Hickson, Collier & Co.*

A. W. G.

C. A.

BUTCHER v. POOLE CORPORATION.

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Nov. 3, 4. *Emergency legislation—Exercise of remedy—Taking possession of property—Re-entry upon land—Service tenancy—Termination of employment and tenancy—Tenant holding over—Eviction by employers—Need of leave of appropriate court—Courts (Emergency Powers) Act, 1939 (2 & 3 Geo. 6, c. 67) s. 1, sub-s. 2 (a) (ii.), (iii.).*

The plaintiff was employed by the defendants, and was required to live in a house provided by them rent free. His employment was terminated by notice on February 28, 1942, and the defendants demanded possession of the house. He did not give up possession, being unable to find other accommodation, and on March 13, without any application to the court under the Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 2 (a), the defendants evicted him. The plaintiff brought an action in the county court claiming damages for wrongful eviction, alleging that the defendants were exercising a remedy within the meaning of the sub-section by way of taking possession of property or of re-entry on land, and could only lawfully do so with leave :—

Held, that s. 1, sub-s. 2 (a), of the Courts (Emergency Powers) Act, 1939, applied only to remedies for default whereby the person against whom the remedy was exercised was deprived of some right of which he could not have been deprived but for the default, and had no application to the case of an absolute owner of land taking possession of it against a wrongdoer, so that the defendants were entitled to evict the plaintiff without leave even if it were assumed in his favour that he had occupied the house in his own right as tenant and not in right of the defendants as their servant.

APPEAL from Poole county court.

The plaintiff, Albert Butcher, was employed by the defendants, the corporation of Poole, as a foreman at their refuse disposal plant. He was provided by the defendants with a house, for which he paid no rent, but which he was required to occupy for the purpose of his employment. His employment was terminated by notice expiring on February 28, 1942, and he was required to give up the house, but he failed to do so, being unable to find alternative accommodation. On March 13, after several requests for possession had been made on behalf of the defendants, they evicted him and removed his furniture, using, as was admitted, no more force than was reasonably necessary for the purpose. The plaintiff thereupon brought an action in the county court alleging that the eviction was wrongful since the defendants had made

no application to the appropriate court for leave under s. 1, sub-s. 2 (a), of the Courts (Emergency Powers) Act, 1939 (1). The defendants alleged that the plaintiff's occupation of the house was merely that of a servant so that at all material times they were in law in possession and had not exercised any right of re-entry or other remedy for which the leave of the court was required, and, alternatively, that from the termination of his employment the plaintiff was a mere trespasser whom they were entitled to evict. The county court judge gave judgment for the plaintiff, and awarded him 50*l.* damages. The defendants appealed.

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Levy K.C. and *Geoffrey Howard* for the defendants. The defendants were entitled to evict the plaintiff: *Hemmings and Wife v. Stoke Poges Golf Club* (2). There was no contract of tenancy between the defendants and the plaintiff, who merely occupied in the right of his employers, as their servant: *Jones v. Foley* (3); *Bracey v. Pales* (4); *Dover v. Prosser* (5). The Courts (Emergency Powers) Act, 1939, was intended to protect contractual and quasi-contractual rights: see the long title to the Act, and s. 1, sub-s. 4. The plaintiff had no such rights, and, therefore, the defendants were not required to apply for leave to re-enter under the Courts (Emergency Powers) Act, 1939, for they were not exercising a remedy within the meaning of s. 1, sub-s. 2 (a), of that Act: *Smart Bros., Ltd. v. Ross* (6). [He referred also to *S. and A. Services, Ltd. v. Dickson* (7).] Nor was the plaintiff "unable to perform "his obligation " by reason of circumstances attributable to

(1) Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 2: "Subject "to the provisions of this section, "a person shall not be entitled, "except with the leave of the "appropriate court,—(a) to proceed to exercise any remedy "which is available to him by "way of—(i.) the levying of distress; (ii.) the taking possession "of any property or the appointment of a receiver of any "property; (iii.) re-entry upon "any land; (iv.) the realisation "of any security or the forfeiture "of any deposit Provided "that this subsection shall not

"apply to any remedy or proceeding available in consequence of "any default in the payment of a "debt, or the performance of an "obligation, being a debt or "obligation arising by virtue of a "contract made after the commencement of this Act."

(2) [1920] 1 K. B. 720.

(3) [1891] 1 Q. B. 730, 732.

(4) [1927] 1 K. B. 818.

(5) [1904] 1 K. B. 84, 85.

(6) [1942] Ch. 158, *revd.* in *H. L.* [1943] A. C. 84; where the dissenting judgment of Lord Greene M.R. in C. A. was upheld.

(7) [1940] 2 K. B. 219.



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the war within the meaning of s. 1, sub-s. 4, although it might be inconvenient for him to vacate the premises and find other accommodation.

Fay for the plaintiff. The long title of the Courts (Emergency Powers) Act, 1939, cannot limit the scope of the statute: Maxwell on the Interpretation of Statutes, 8th ed., pp. 37, 38. Re-entry is a remedy, even if it is extra-judicial: see Salmond on Torts, 9th ed., p. 196. The plaintiff had something in the nature of a squatter's title, and he was, therefore, entitled to the protection in s. 1, sub-s. 2 (a) (iii.), of the Act. That provision refers to "re-entry upon any land," and prima facie covers the case of a landlord who enters against a tenant holding over. It is said that what the defendants did was not to exercise a "remedy" by way of re-entry, but was merely to enforce a right, but that is not so. As to the distinction between right and remedy, see *Smart Bros., Ltd. v. Ross* (1). [LORD GREENE M.R. There is a class of remedy which has the effect of defeating the title of the other party to something: e.g. distress for rent. Other classes of remedy merely assist the title of the person exercising the remedy. May it not be that the Act covers only remedies of the former class?] That, it is submitted, is too narrow. There is nothing in the sub-section to confine "remedies" to those ancillary remedies. [LORD GREENE M.R. Does not your argument lead to the conclusion that, if A steals B's bicycle and B sees it in the road, he cannot retake possession of it without the leave of the court?] I think I must admit that conclusion, but it is a perfectly comprehensible policy for the legislature in war-time to say that people must not take the law into their own hands. The plaintiff occupied as a tenant, but even if he occupied only as a servant, so that possession was his employer's during the service, after the service ended he was a mere trespasser, and was asserting his own possession adversely to his employer who was exercising a remedy by taking possession: see *Reg. v. Spurrell* (2); *Smith v. Seghill Overseers*, per Mellor J. (3); *Martin v. West Derby Assessment Committee*, per Coleridge C.J. and Brett L.J. (4). This case can be distinguished from *Smart Bros., Ltd. v. Ross* (1) in which there was no breach of any contractual or

(1) [1942] Ch. 158, 166; revd.
in [1943] A. C. 84.

(2) (1865) L. R. 1 Q. B. 72, 75.

(3) (1875) L. R. 10 Q. B. 422,
428.

(4) (1883) 11 Q. B. D. 145, 149,
151.

quasi-contractual relations. Here there was such a breach, and a remedy was exercised. "Unable" in s. 1, sub-s. 4, refers to practical, not to physical, impossibility. [He referred to *National Provincial Bank, Ltd. v. Liddiard* (1), and *Wood v. Smallpiece* (2).]

Howard in reply. If there is no possibility of relief under s. 1, sub-s. 4, the Act does not apply at all: per Farwell J. in *National Provincial Bank, Ltd. v. Liddiard* (1). That sub-section only applies where there is some obligation, the breach of which has given rise to a right to exercise a remedy. Here the defendants' right did not arise from any breach by the plaintiff, but was inherent in their ownership of the house.

LORD GREENE M.R. One of the questions which have been debated before us is whether or not the plaintiff occupied the house as a tenant or merely for the necessary purposes of his employment so as to make his possession that of his employers during the continuance of the employment. The county court judge did not apparently direct his mind to that question. I do not find it necessary for the purpose of my judgment to go into that matter, nor to discuss a further point raised by Mr. Fay that, even if during the employment the plaintiff was in possession for his employers, as soon as he refused to go at the end of the tenancy, the situation was changed, and from that moment he possessed, albeit wrongfully, for himself, a point which would require serious consideration. I propose to deal with the case on the highest assumption in favour of the plaintiff which can be made, namely, that his occupation during the employment was that of a tenant, that he had possession for himself throughout, and that when the tenancy came to an end he remained in possession, albeit wrongfully. I make that assumption, without expressing any opinion one way or the other on this particular part of the controversy.

On that assumption the question arises of the applicability of the Courts (Emergency Powers) Act, 1939. It is said that the defendants, in taking possession as they did, were exercising a remedy by way of the taking of possession of property or by way of re-entry on land, within paras. (ii.) and (iii.) of s. 1, sub-s. 2 (a), of that Act. The county court judge apparently dealt with that as the only question which he had to decide. We have not the advantage of any reasoned

(1) [1941] Ch. 158.

(2) [1942] Ch. 190.

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judgment by him, but it appears that in his experience it had been the practice in such cases to apply for leave and he considered that it was necessary to do so. The question thus formulated raises in an acute form the precise limitation of the relief with which the Act deals. The case for the plaintiff has been put with great care and ability by Mr. Fay, but I am unable to accept it.

The Act is entitled: "An Act to confer on courts certain powers in relation to remedies in respect of the non-payment of money and the non-performance of obligations." It is settled that the title of an Act of Parliament is not to be taken as limiting the provisions of the enactment. The utmost use that can be made of it is to aid in construing words of doubtful or ambiguous import in the Act, but in the present case I find in the body of the Act, apart from the language of the long title, words which, to my mind, make it clear that what the defendants did is outside the Act altogether.

Sect. 1, sub-s. 1, deals with the enforcement of judgments or orders of any court for the payment or recovery of a sum of money, subject to certain exceptions. Sub-s. 2 deals, not with enforcing judgments of the courts, but with what may be conveniently described as acts of self-help. Sub-s. 3, as amended by subsequent legislation, deals with the enforcement of judgments or orders of the three kinds specified in the sub-section for the recovery of possession of property. That sub-section gives no protection in the case of self-help, nor does it give protection in respect of judgments for the recovery of possession of land save in the three cases mentioned, in all of which the judgment has been given by reason of a default. By sub-s. 4, if, on an application for leave to exercise any of the remedies mentioned in the three previous sub-sections, the court is of opinion that the person liable to satisfy the judgment or order or to pay the rent or other debt, or to perform the obligation, in question is unable immediately to do so by reason of circumstances directly attributable to the war, the court may refuse leave. The language of sub-s. 4 appears to indicate that the three previous sub-sections deal with cases where the right of the party who is seeking to enforce a remedy arises by virtue of a failure to satisfy a judgment, or to pay rent or other debt, or to perform an obligation. That construction appears to me quite clearly to follow out the intention of the Act as expressed in the long title. Again, in sub-s. 2, on which the present question primarily turns, the

conception is brought out that the legislature is dealing with remedies which become available in consequence of default in the payment of a debt or in the performance of an obligation.

To see how far the construction of this sub-section has gone, I may at this point refer to *Smart Brothers, Ltd. v. Ross* (1), where I said: "When the matters with which the sub-section specifically deals are examined, it appears that they all have 'one character. They are all what I may call remedies for 'default of some kind. The levying of distress is a remedy 'for default in payment of rent. The appointment of a 'receiver of property is a remedy for default in payment of 'interest or something of that kind. Re-entry on land is a 'remedy for default or breach of covenant. The realization 'of any security or forfeiture of any deposit is a remedy for 'default in paying the debt in respect of which the security 'was given or discharging the obligation in respect of which 'the deposit was made.'" Those observations, I think, are binding on this court because that judgment was accepted by the House of Lords as a correct statement of the law (2), but they do not carry us far enough to answer the question which this appeal raises, and some further observations of a general nature may be helpful.

It was argued by Mr. Fay that the defendants exercised a remedy, which was available to them, by way of the taking of possession of the property and also by way of re-entry on the land. In the abstract, no doubt, a person who takes what is his own is exercising a remedy, and it may be that he exercises that remedy against the will and in spite of the opposition of somebody else. The question, however, which we have to decide is, not whether it is correct in an abstract sense to describe the action of an owner of land who takes possession of his land as the exercise of a remedy by way of taking possession of land or re-entry, but whether in the context of this Act of Parliament it is a remedy of the kind referred to in s. 1, sub-s. 2 (a). It is useful to observe that a remedy by way of taking possession of land or re-entry on land, using the word "remedy" in the broadest sense, may be of two kinds. It may be a remedy the exercise of which determines or defeats some right or title in the person against whom it is exercised, or it may be a remedy the exercise of which is merely an exercise of the existing right of property of the person exercising it and does not in any way defeat or determine any

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(1) [1942] 1 Ch. 158, 167.

(2) [1943] A. C. 84, 89.

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estate, interest, or title of the person against whom it is exercised. I can make that distinction clearer by taking a typical example of each case. A right of re-entry under a lease for breach of covenant is one the exercise of which determines the existing interest of the tenant, whereas a person who merely goes into possession of property of which he is the absolute owner is not determining or defeating anybody's title. Many other examples occur to one. If, under a settlement, a person is entitled to property for his life or until marriage and on marriage the property passes to another person, as soon as the marriage takes place the estate of the first taker comes to an end, the right to possession vests in the remainderman, and when he goes into possession, whether he does so peacefully or forcibly, he does not defeat any right or determine any interest in the first taker because the right and interest of that first taker has ceased to exist. Another example is that of a landlord who re-enters on the termination of a lease. He is merely exercising his own proprietary right and is not doing something which defeats or determines the interest of the lessee as is the case where a right of re-entry for breach of covenant is exercised. The last and perhaps most striking case is where the true owner of property takes back that property, when he finds it, out of the possession of a thief. If A steals B's bicycle and B finds it, B, in taking that bicycle back, is merely exercising his own proprietary right and is not defeating or determining any right in A. A, it is true, is in possession of the bicycle, but his possession is wrongful as against the true owner, and it does not defeat any right in him to terminate that wrongful possession by a re-taking by the true owner. I mention that case because Mr. Fay admitted that, according to his argument, the true owner of the bicycle would not be entitled to retake it from the thief without the leave of the court. The true owner would be exercising a remedy by way of the taking of possession of property, and, therefore, the Act would cover the case. He went on to say that, even if sub-s. 2 only applies to a case where there is default in the performance of an obligation, there would, in that hypothetical case, be such a default because there lay on the thief an obligation to return the bicycle which he had stolen.

Coming now to the present case, Mr. Fay, while arguing that it was enough that the landlords were exercising a remedy by way of taking possession or re-entry, contended that, even

if the sub-section is to be limited to cases where the right to the remedy arises by reason of a breach of an obligation, there was a breach of an obligation in the present case because the plaintiff's duty was to give possession of the property and he had failed to do so, with the result that there was default in the performance of an obligation and the remedy was exercisable by reason of that default. I am prepared to assume in Mr. Fay's favour that it was an implied term of the contract of employment under which the plaintiff had occupation of the house that he should deliver up vacant possession of it at the end of the employment and that his failure to do so was the breach of an obligation. That does not appear to me to assist the matter because, apart from any implied obligation of that kind, there was a right in the defendants to take possession of their own property as against a person in admittedly wrongful possession, and in exercising that right they were not exercising a consequential remedy which accrued to them by reason of the obligation. They were exercising a remedy inherent in their right of property, namely, the right to take their own property by lawful means whenever they could and to eject a trespasser.

It seems to me that the class of subject-matter referred to in s. 1, sub-s. 2, must be limited by reference to the other provisions of the Act, in particular, to s. 1, sub-s. 4. Sub-s. 4 contemplates that there is a person liable to perform the obligation "in question," the obligation in question being one the default in the performance of which confers on the obligee the right to exercise the remedies in question. When those remedies are looked at, it appears to me that all of them are concerned with matters which defeat or take away the rights of the other party. The effect of levying distress is to deprive the owner of the goods of his right to them, subject to the provisions of the law relating to distress. The appointment of a receiver, again, has the effect of displacing a person who would otherwise be entitled to possession of the goods or land in respect of which the receiver is appointed. To the realization of security or the forfeiture of a deposit precisely the same observations apply. Is sub-s. 2 (a) to be construed as though in the case of taking possession or re-entry on land a totally different class of remedy is also being contemplated by the legislature, namely, a class of remedy the right to exercise which is given to a man by virtue, and by virtue only, of his right of property? It seems to me that the whole

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tenor of the sub-section points clearly to the view, first that all these remedies are remedies for default, and, secondly, that their effect is to determine some existing right or interest which but for the default could not have been determined. That seems to me to be the necessary conclusion when the sub-section is read in the light of the other provisions, and, particularly, of sub-s. 4. I may refer also to the proviso to sub-s. 2 which provides that the sub-section is not to apply "to any remedy . . . available in consequence of any "default in the payment of a debt, or the performance of an "obligation, being a debt or obligation arising by virtue of "a contract made after the passing of this Act." That suggests very strongly that the class of remedy which has been dealt with in the earlier words is available in consequence of a default in the payment of debt or the performance of an obligation. That is in accordance with the construction which I consider to be right, and it strengthens the view which I have formed. In the present case an obligation to deliver up arose, it is true, according to Mr. Fay, by virtue of an implied term in a contract which was made before the commencement of the Act, but, carrying his argument to what he agrees is its necessary logical conclusion, it would appear to have the curious result that, if in the example I have given, the man stole the bicycle after the commencement of the Act, the Act would not apply, but that, if the theft had taken place before the Act, the leave of the court would be required before possession of the bicycle could be retaken. It seems to me that that is a very curious and illogical conclusion.

The truth of the matter, in my judgment, is that s. 1, sub-s. 2, has nothing to do with the exercise of a remedy the right to exercise which does not arise by reason of default in payment of a debt or performance of an obligation, and, in particular, that it does not apply where the remedy becomes available simply and solely by virtue of the proprietary right of the person who exercises it and is exercised, not so as to defeat or determine a right of somebody else, but merely to give back to the owner something which is his own. More assistance, perhaps, may be obtained from *Smart Brothers, Ltd. v. Ross* (1). It was there argued that the relief given by the Act was very extensive and applied where a lessee took possession of premises which had been demised to him under a lease. It was also argued at one stage that it would apply

(1) [1942] Ch. 158; [1943] A. C. 84.

to the case of a purchaser to whom the property in the goods had passed and who took possession of the goods purchased. That construction was distinctly negatived and I may venture to read another passage from my own judgment as follows (1) : "It is then said, alternatively, that the owners would be "exercising a remedy given to them by the agreement contained in the letter written by Miss Ross. If this argument "is a sound one it merely means that the word 'remedy' "includes any right to take possession." Then comes the passage which I have already read, after which I went on to say : "That being the type of transaction in respect of which "the word 'remedy' is used, I ask myself whether it is possible "to extend the construction of that word so as to cover a case "of a totally different character, that is to say, a case where "the right to take goods arises, not because a contract has been "broken and to remedy the breach, but because the contract "between the parties is nothing more than that the ownership "(if it be ownership) which includes the right to possession "or the right to possession alone is to pass to the other party. "It seems to me that, if the construction suggested by counsel "were adopted, every lessee who took a lease which gave him "the right to go into possession of a house must be said to be "exercising a 'remedy' available to him by way of taking "possession of the property. I venture to think that the word "'remedy' in such a context as this is quite unsuitable to "meet that class of case." That aspect of the matter emerged in the course of the present discussion, and Mr. Fay necessarily and logically said that a distinction must be taken between two cases. He said that if a lessee is given vacant possession and merely goes into the demised property he is not exercising any remedy because there has been no default, but if, on the other hand, the lessor fails to give what he ought to give, namely, vacant possession of the demised premises, it would not be legitimate for the lessee to enter without the leave of the court. That seems to me, if I may say so with all respect to a very able argument, to be a *reductio ad absurdum*. Why in the world any such distinction should have been intended by the legislature, I really do not see. The truth is that in both those two cases, whether the lessor gives vacant possession or whether he does not give vacant possession, the lessee, in going into possession of property in which he has an interest and in respect of which everybody excluding him from

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possession is a wrong doer, is not exercising a remedy arising in default of the performance of an obligation, but is merely exercising a right which he has acquired under the lease. He is not depriving the lessor of any property of his. He is not determining any estate of the lessor. He is merely acting by virtue of his own interest and that class of act, in my opinion, is not a remedy within the meaning of the sub-section.

That, I think, concludes all I need say except to quote the language of Viscount Simon L.C. in *Smart Brothers, Ltd. v. Ross* (1). In dealing with the argument to which I referred in the passage which I last read from my own judgment, the Lord Chancellor said that the case before him did not require leave by the court as the requirement in the statute as to such leave had no application "because the appellants in the circumstances are not 'exercising' a 'remedy' available to them "by way of' the taking of possession, but are resuming the "full control and ownership of the furniture under the terms "of a bona fide agreement which does not involve the exercise "of a remedy available to the appellants at all, whether by "consent or otherwise." There he appears to me to be accepting the distinction which I had drawn, namely, the distinction between the exercise of a simple right of property, whether that arises by contract or otherwise, and the exercise of a remedy which operates to defeat or determine the interest or title of somebody else. In the result, therefore, the appeal must be allowed.

DU PARCQ L.J. I agree. It is impossible to construe words in an Act of Parliament without reference to their context and the whole tenor of the Act. I should be prepared to agree with Mr. Fay that the words "any remedy by way of "re-entry upon any land," taken alone, would be wide enough to include re-entry upon land of which a trespasser had taken possession, but for the reasons given by the Master of the Rolls I am of opinion that it is manifest that the words in their context mean a right of re-entry by reason of the antecedent failure of the occupier of the land to fulfil some obligation. I propose to add no words of my own beyond what I have already said to the judgment which has been delivered by my Lord because it expresses the view which I have formed, and I cannot hope to improve on the manner of that expression. I agree that the appeal should be allowed.

(1) [1943] A. C. 84, 91, 92.

LEWIS J. I agree entirely with the judgments which have been delivered. I only want to add that it seems to me that the answer to the argument of Mr. Fay is really to be found in *Smart Brothers, Ltd. v. Ross* (1).

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Solicitors for defendants: *Woodcock, Ryland & Co., for Preston & Redman, Bournemouth.*

Solicitors for plaintiff: *Peacock & Goddard, for Trevanion & Curtis, Poole.*

J. W. H.

(1) [1942] Ch. 158; in H. L. [1943] A. C. 84.

HUCKLE v. LOWESTOFT CORPORATION.

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Oct. 29, 30.

Local government—Restriction of ribbon development—Claim for compensation by landowner—Material date in assessing compensation—Date of claim—Date of arbitration—Intervention of war between claim and arbitration—Right of arbitrator to consider—Restriction of Ribbon Development Act, 1935 (25 & 26 Geo. 5, c. 47), s. 9, sub-s. 1; sub-s. 4 (a).

In assessing the compensation payable under s. 9 of the Restriction of Ribbon Development Act, 1935, to the owner of an estate or interest in land, which estate or interest has been injuriously affected by the restrictions imposed by the highway authority under the Act, the correct basis to be applied by the arbitrator is the conditions as they existed at the date when the claim was made and not those prevailing at the date of the hearing before the arbitrator. As, however, in assessing the market value of the estate or interest when the land is subject to restrictions, the arbitrator is required by s. 9, sub-s. 4 (a), of the Act to take into account any modification of those restrictions "by reason of any "consent . . . or of any undertaking given . . . by the highway "authority," matters which may be referable to a date subsequent to that of the claim, he is entitled, in considering those matters, to have regard to the fact that the intervention of war conditions after the date of the claim has had the effect of indefinitely postponing the possibilities of the development of the land.

AWARD stated in form of special case by official arbitrator.

On July 12, 1937, the claimant, who was possessed of an estate or interest in certain freehold land in Suffolk which was injuriously affected by the restrictions imposed by s. 2 of the Restriction of Ribbon Development Act, 1935, applied to the Lowestoft Corporation, as the highway authority and

Reported by Philip B. Durnford, Esq., Barrister-at-Law,

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restricting authority under the Act, for their consent to his developing his land by the construction of a new means of access to a main road in the district. On September 17, 1937, the highway authority gave their consent subject to certain conditions with which the claimant found it impossible to comply. He appealed unsuccessfully to the Minister of Transport, and on June 13, 1939, he made a claim for compensation under s. 9, sub-s. 1, of the Restriction of Ribbon Development Act, 1935 (1), on the ground that his estate or interest had been injuriously affected by the restrictions imposed by the Act. On September 3, 1939, war was declared and the development of estates was postponed indefinitely.

(1) By Restriction of Ribbon Development Act, 1935, s. 9, sub-s. 1: "Subject to the provisions of this section, if any person having any estate or interest in land, . . . subject to restrictions in force under s. 1 or s. 2 of this Act, proves that his estate or interest is injuriously affected by the restrictions, he shall be entitled to recover from the highway authority compensation for the injury to that estate or interest; and any question whether compensation is payable under this section or as to the amount of any compensation so payable, shall, in default of agreement, be determined by an official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919: Provided that, without prejudice to the power of a highway authority to agree with any claimant as to the payment of compensation, no claim for compensation under this section in respect of injurious affection to any estate or interest shall be entertained by an arbitrator — (a) unless the claimant satisfies the arbitrator — (i.) that proposals for the development of that land which at the date of the claim to compensation

"are immediately practicable or
"would have been so if this Act
"had not been passed, are prevented or injuriously affected
"by the restrictions; and (ii.) that
"there is a demand for such
"development . . ."

"Sub-s. 4: In awarding compensation under this section in respect of any estate or interest in land, the compensation shall, subject to the provision of this section, be a sum equal to the difference between the market value of the estate or interest when the piece of land is subject to the restrictions and what would have been the market value of that estate or interest if the piece of land had not been so subject: Provided that—(a) in assessing the market value of the estate or interest when the piece of land is subject to the restrictions, there shall be taken into account any modification of those restrictions by reason of any consent given by the highway authority and any conditions attached to such consent, or by reason of any undertaking given or proposed to be given by the highway authority and any such consent, conditions, or undertaking, shall be embodied in the award; . . ."

On March 17, 1941, the highway authority, acting in accordance with s. 9, sub-s. 4 (a), of the Act of 1935, gave an undertaking that the condition attached to their consent of September 17, 1937, might be regarded as withdrawn. The parties being unable to agree to the amount of compensation (if any) to which the claimant was entitled, an arbitration was held on September 16 and 17, 1941. It was proved or admitted at the hearing that the claimant's estate or interest in the land in question was injuriously affected by the restrictions imposed by s. 2 of the Act and that the conditions of the consent given by the highway authority on September 17, 1937, were impossible of performance by him. The arbitrator was satisfied, as required by the proviso to s. 9, sub-s. 1, that at the date of the conditional consent on September 17, 1937, and of the claim to compensation on June 13, 1939, proposals for the development of the claimant's land were immediately practicable or would have been so if the Restriction of Ribbon Development Act, 1935, had not been passed, and that on those dates there was a demand for that development. He found that at the date of the hearing before him, by reason of the undertaking given by the restricting authority under s. 9, sub-s. 4 (a), there were then no conditions imposed which would prevent the development of the claimant's land, but that since the claim on June 13, 1939, war conditions had intervened which had postponed indefinitely the possibilities of the development of the land and that at the date of the hearing there was, by reason of those conditions, no demand for development. It was submitted on behalf of the claimant that the material date in assessing compensation was June 13, 1939, the date of the claim, and that war conditions ought not to affect the claimant's right to compensation in respect of the injurious affection of his estate or interest by reason of restrictions in force at the date of the claim and before the outbreak of war. It was contended by the highway authority that the language of the Act indicated that the correct basis for compensation was the conditions prevailing at the date of the hearing before the arbitrator and that on that date, by reason of the undertaking given by the highway authority, there was no such restriction in force as could give rise to any claim for compensation under the Act.

The arbitrator submitted the following questions for the opinion of the court: (1.) Whether the correct basis for the assessment of compensation under s. 9 of the Act was the

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conditions as at June 13, 1939, the date of the claim. (2.) Whether such basis was the conditions as at the date of the hearing before him on September 16, 1941. (3.) Whether, in assessing compensation, he was entitled to have regard to the injurious affection of the claimant's estate and interest due to war conditions postponing indefinitely the possibilities of development. If the answer to question (1.) should be in the affirmative, the arbitrator assessed the compensation payable to the claimant at 585 $\frac{1}{2}$ l. If the answer to question (2.) were to be in the affirmative, he assessed the compensation at nil. If, in the opinion of the court, he was entitled to consider the matters specified in question (3.), he assessed the compensation payable at the aforesaid sum of 585 $\frac{1}{2}$ l.

H. B. Williams for the claimant. The answer to the first question submitted by the arbitrator should be in the affirmative. By the proviso to s. 9, sub-s. 1, of the Act the claimant is to receive no compensation unless he satisfies the arbitrator that proposals for the development of his land which were immediately practicable "at the date of the claim" have been prevented or injuriously affected. This points to that date as being the material time to be considered. It would, moreover, be extremely difficult if the arbitrator had to find the facts which alone could justify an award in the claimant's favour as having existed at one date but was required to assess the damage which flowed from those facts on the basis of conditions at a later date. Further, by s. 9, sub-s. 4 (a), in making his assessment, the arbitrator is directed to take into account matters which may have happened after the claim, and it is impossible that Parliament would have found it necessary to direct him to consider such matters if it intended that the basis of compensation should be the conditions as at the date of the hearing. [He referred to *Bwllfa and Merthyr Dare Steam Collieries* (1891), *Ld. v. Pontypridd Waterworks Co.* (1).]

Craig Henderson K.C. and *Summerfield* for the highway authority. The answer to the second question submitted should be in the affirmative. It is clear from the language of s. 9, sub-s. 1, that the basis of assessment is to be the conditions as at the date of the hearing by the arbitrator. The sub-section provides that "if any person *proves*" that his interest "*is*" injuriously affected. The use of the present

tense indicates that the claimant has no right to compensation until he comes before the arbitrator and satisfies him that his interest is injuriously affected. The contention is further strengthened by the words of the proviso: "*are* prevented" or injuriously affected." Again, the present tense indicates that the time of the hearing is contemplated. A similar observation applies to the concluding words of the proviso: "there *is* a demand for such development." It is also to be noticed that when the legislature intends in that proviso that the date of the claim should be the material time, it says so in so many words.

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VISCOUNT CALDECOTE C.J. The first and second questions submitted by the arbitrator to the court relate to the time at which the market value of the estate or interest in the land is to be assessed. In the present instance, as, indeed, will almost always be the case, a considerable time elapsed between the making and the hearing of the claim, and the first question we have to consider is whether or not the arbitrator is to confine his attention to the conditions which existed at the date of the claim. So far as we have been informed, there is no guidance in the shape of authority to be found on this point except such rather dim light as we may derive from cases arising under ordinary claims for compensation, for instance, under the Lands Clauses Act. The well known case, *Bwllfa and Merthyr Dare Steam Collieries* (1891), *Ld. v. Pontypridd Waterworks Co.* (1), was brought to our attention, but I find it difficult to obtain much, if any, guidance from that decision. We must ascertain what is intended by the Act under consideration by an examination of its provisions.

Apart from statutory provision to a contrary effect, when Parliament provides for compensation to be paid its intention is that the measure of that compensation is to be fixed either by agreement or by arbitration as at the time when the claim arose. If that were not so, the consequence would seem inevitably to be that the amount of compensation might depend on the engagements of the arbitrator, on the dilatoriness or otherwise of the compensating authority, or on a number of accidents which might happen to postpone the hearing of the claim. In view, however, of the difficulties of the language in which this Act is couched, it is necessary to look very closely at its terms to see whether it contains words which indicate

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that Parliament intended that the date with reference to which the measure of compensation should be fixed should be, not the date of the claim, but that of the hearing. We were referred by Mr. Craig Henderson, on behalf of the highway authority, to the provisions of s. 9, sub-s. 1, and he submitted that the use of the present tense in the phrase "*proves* that his estate or interest *is* injuriously affected" indicated that the claimant has no right to compensation until he comes before the arbitrator and is in a position to satisfy him that his estate or interest is injuriously affected, presumably at the moment of time when the claim is before the arbitrator. I do not think that so much weight should be given to the form in which the sub-section is enacted. The construction contended for places on the word "*proves*" a strain which it is not able to bear. Obviously, the claimant cannot recover compensation until he "*proves*" that his estate or interest is injuriously affected, but I cannot take the view that, by the use of the word "*proves*," Parliament intended to say that no right to compensation arose until the proof had been given.

That, however, does not exhaust the difficulties of interpreting s. 9, sub-s. 1. Mr. Craig Henderson also contended that the words "at the date of the claim" in the proviso showed that, when the legislature intended that that date should be the material one, it said so in terms, and that the words "or "would have been so if this Act had not been passed" also indicated that the relevant date for the present purpose was that of the hearing before the arbitrator. I find no clear indication, however, that Parliament intended by these words to provide that the date at which the compensation should be assessed is, contrary to what I think is reasonable, to be that of the hearing of the claim and not of the making of it. Turning to sub-s. 4 of the section which provides the measure of compensation, there is nothing down to the proviso which, in my judgment, alters what I have already said as to the prima facie intention of Parliament by suggesting any intention to postpone the assessment of a claimant's compensation to the date when the hearing of the claim takes place. Indeed, the words "and what would have been the market value of "that estate or interest if the piece of land had not been so "subject," seem to support the view I have formed on the first question submitted to the court, while the proviso to the sub-section appears to me to be silent on the question which we have to consider.

On the whole, therefore, I have come to the conclusion, in answer to question (1.) submitted by the arbitrator, that the correct basis for the assessment of compensation under s. 9, is the conditions as at the date of the claim, namely, June 13, 1939. I find it impossible, however, to answer the question with a simple affirmative. In my opinion, a qualification must be added which may possibly result in a rehearing of this claim to some extent. The necessity for a qualification arises from a consideration of question (3.) which raises a very difficult point. The proviso to sub-s. 4, of s. 9, in accordance with the plain intention of the Act not to allow extravagant claims to be made, provides that the arbitrator, in assessing compensation, is to take into account any modification of the restrictions imposed pursuant to any consent given by the highway authority or by reason of any undertaking given by the highway authority. For instance, supposing restrictions were imposed on January 1 by the refusal of consent to some plan of development and that a claim was made for compensation on February 1. I think that Parliament intended that, if the restrictions were withdrawn on March 1, the arbitrator should be in a position to say that the claimant was not entitled to compensation based on the difference in the value of his interest in the land with and without restrictions on February 1, but only to a sum which would take into account that those restrictions had been withdrawn on March 1. Question (3.) is whether, in assessing compensation for injurious affection, the arbitrator is entitled to have regard to injurious affection due to war conditions. If I were to answer that question literally I think my answer would be in the negative, because, in my opinion, the injurious affection which has to be considered is that attributable to the restrictions on a claimant's estate or interest in land and not that due to the war, but I am also of opinion that, in taking into account the withdrawal of the restrictions or the undertaking given by the highway authority, the arbitrator is entitled to have regard to the fact that war had already broken out, that it was going on at the time of the hearing, and that it was likely to last for some considerable time.

Therefore, I answer question (1.) by saying that the correct basis in assessing compensation is the conditions at the date of the claim, subject, however, to the right of the arbitrator, when taking into account the matters specified in proviso (a)

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to sub-s. 4, to have regard to the happening of the war. Having answered question (1.) in that way, it follows that question (2.) must be answered in the negative. In view of the answer which I suggest is the right one to question (1.), it becomes unnecessary to answer question (3.). It may be that the arbitrator will think it right to reconsider his award of 585*l.* in the light of the outbreak of war. On the other hand, he may think it unnecessary to give any further consideration to that point because he has already considered it in taking into account the withdrawal of the restrictions. That is a matter for him to decide.

TUCKER J. I agree. By this case we are asked to decide the precise date to which the word "is" applies in s. 9, sub-s. 1, of the Restriction of Ribbon Development Act, 1935. Does the word "is" in the phrase "is injuriously affected by the restrictions" apply to the date when the claim is made or to that when the arbitrator enters on his inquiry? Mr. Craig Henderson, for the highway authority, contends that it applies to the latter date. In support of that argument he draws attention to the use of the word "proves" in the sub-section, and says that the right to compensation only accrues when the proof is made and that proof cannot be made until the matter comes before the arbitrator. He further says that a distinction must be drawn between the use of the word "is" in the body of the sub-section and the phraseology in proviso (a) (i.) to the sub-section where the practicability of proposals for the development of the land is being dealt with. The words of that proviso are "that proposals for the development of that land which at the date of the claim for compensation are immediately practicable or would have been so if this Act had not been passed." He draws attention to the use of the phrase "at the date of the claim," and says that when the legislature wishes to make something referable to the date of the claim it says so in so many words. With regard to the concluding words of the proviso: "are prevented or injuriously affected by the restrictions," counsel again calls attention to the use of the present tense, and says that the position at the date of the hearing must be meant, and that the same applies to para. (ii.) of proviso (a) where the words are "that there is a demand for such development."

While giving due weight to that argument, I have come to

the contrary view. One has to bear in mind what is the subject-matter of the claim. Having regard to the fact that the procedure under the Acquisition of Land (Assessment of Compensation) Act, 1919, is applied, which involves the making of a written claim, I think that a claim is pre-supposed to some right which has accrued at the time of the making of the claim. In my view, the use of the present tense does not assist us because the legislature must be taken throughout to be speaking as from the date when the claim is made, and the words "is" and "are" must be taken to mean is or are at the material time, whatever that time may happen to be. I am further persuaded to that view by the fact that provisos (a), (b) and (c) to s. 9, sub-s. 4, all seem to point to the fact that the arbitrator is told that in assessing compensation he should give effect to matters which may have arisen after the date of the making of the claim. That reinforces the view that *prima facie* the material date is that when the claim is made, but that, in assessing the compensation as at that date, certain factors are to be taken into consideration if they have arisen subsequently. I, therefore, agree that the answer to the first question is "Yes," subject to due effect being given to proviso (a) of sub-s. 4 of s. 9. I am conscious of the fact that the view which I have taken of the words "are" and "is" in proviso (a) (i.) and (ii.) to sub-s. 1 is not that which was expressed by *du Parcq J.* in *Melksham U. D. C. v. Wiltshire County Council* (1), but his observations in that case on the words "are" and "is" were not necessary for its decision. Nor are my observations with regard to the words necessary for a decision here, but in coming to a decision on the meaning of the word "is" in s. 9, sub-s. 1, I have felt bound to consider the meaning of "is" and "are" in provisos (a) (i.) and (ii.), and, with great respect to *du Parcq J.*, I find myself unable to come to the same conclusion as that expressed by him. In view of what he said I feel the less confidence in the decision which I have arrived at with regard to the word "is" in s. 9, sub-s. 1, but none the less I feel bound to express it.

If Mr. Craig Henderson is right in saying that the date to which the word "is" refers in s. 9, sub-s. 1, proviso (a) (ii.), in the phrase "there is a demand for such development," is the date of the hearing, then, on the facts as stated in the case by the arbitrator, he would appear to have no jurisdiction

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to consider the assessment of compensation at all. He states in terms in the case: "I further find that since the date of the claim, namely, June 13, 1939, war conditions have intervened which have postponed indefinitely the possibilities of development of the aforesaid land, and at the date of the hearing before me there was by reason of such war conditions no demand for development." In view of that finding, the arbitrator could have had no jurisdiction to consider the question of compensation if the material date was that of the hearing. That, however, is not a point which has been referred to us and the only question which we have to consider is what is the date to which he should direct his mind. I desire to add nothing to what my Lord has said with regard to the effect to be given by the arbitrator to the war conditions when he comes to apply proviso (a) of sub-s. 4 of s. 9 in assessing the correct figure of compensation.

CASSELLS J. I agree. The point which is raised by the special case is what is to be considered as the date at which the compensation for injurious affection has to be assessed? Is it to be June 13, 1939, three months before the war, when the claim was made, or is it to be September 17, 1941, when the arbitrator heard the case?

In so far as assistance is forthcoming from the Act itself on this point, it is to be obtained, I think, from s. 9, sub-s. 1, but I am not sure that it is very helpful. The provisions of s. 9, sub-s. 1, have been relied on by both sides. On the one hand, it is said that "the date of the claim" appears specifically, where it is intended to apply, in proviso (a) (i.); on the other, the word "proves" has been underlined by counsel for the highway authority as indicating that the date to be considered is that when the arbitrator hears the case.

In my view, the latter contention cannot prevail for many reasons. Among those reasons I will mention one, namely, that if the date of the arbitration was to be the material date it would be giving an undue interest to the parties either to delay or expedite the hearing of the arbitration. Suppose that in this case, instead of a war, some other event had occurred which completely altered the value of the estate and increased it enormously, so that when the arbitration was heard, more than two years after the claim was made, the difference between the value of the estate at the time of the arbitration and the value at the date of the claim was

very large. If the date of the arbitration were the material one, the claimant would be entitled to say that he must be given compensation on a higher scale by reason of the improvement in the value. In the present case the position is the reverse of that which I have suggested, and it is contended by the highway authority that, the war having indefinitely postponed all estate development, the amount of compensation to which the claimant is entitled, is nil. I do not think that is the proper interpretation. The real date to be considered is that at which the claim is made, and, that being so, I agree with the answer which is proposed to be given to question (1.), subject to the proviso which my Lord has suggested. There is no necessity in those circumstances to answer either question (2.) or question (3.).

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Case remitted.

Solicitors for claimant: *Laytons, for Greene, Morgan & Greene, Ipswich.*

Solicitors for Lowestoft Corporation: *Sharpe, Pritchard & Co., for F. B. Nunney, Town Clerk, Lowestoft.*

In re TAXATION OF COSTS.

C. A.

In re SOLICITORS.

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Oct. 19.

Solicitor—Costs—Bill for gross sum—Demand by client for detailed bill—Taxation of detailed bill—Amount recoverable—Solicitors' Remuneration (Gross Sum) Order, 1934 (St. R. & O., 1934, No. 548), para. 1.

When a solicitor, acting under the Solicitors' Remuneration (Gross Sum) Order, 1934, has charged a client with a gross sum and the client, pursuant to the proviso to para. 1 of the order, requires delivery and subsequently taxation of a detailed bill of charges, the solicitor can recover the amount of the taxed bill, although it exceeds the amount of the gross sum first charged.

Since the Solicitors' Remuneration Act General Order, 1920, *In re Tilleard* (1863) 32 Beav. 476, is not good law, if indeed it ever was.

Reported by C. G. Moran, Esq., Barrister-at-Law.

C. A. APPEAL from order of Tucker J.

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On May 1, 1941, a firm of solicitors, acting in pursuance of the Solicitors' Remuneration (Gross Sum) Order, 1934 (1), delivered to their client gross sum bills, the total of which amounted to 26*l.* 9*s.* 3*d.* This sum was made up as follows: (1.) Re mortgages on Birmingham properties, 3*l.* 17*s.* 1*d.*; (2.) Re sch. A tax, 662 Finchley Road, 3*l.* 14*s.* 3*d.*; (3.) Repayment of income tax and general, 7*l.* 16*s.* 5*d.*; (4.) Collection of rents (by commission), 2*l.* 15*s.*; (5.) Collection of rents (prior to commission agreement), 1*l.* 11*s.* 6*d.*; (6.) Reduced costs of writ to recover rent, 4*l.*; (7.) Disbursements throughout, 2*l.* 15*s.*—total, 26*l.* 9*s.* 3*d.* On August 20, 1941, the client required a detailed bill of charges to be delivered. The solicitors complied with the requisition and the detailed charges in matters (1.), (3.) and (5.) were larger than the gross sum bills, namely, in matter (1.), 7*l.* 4*s.* 3*d.*; in matter (3.), 10*l.* 10*s.* 11*d.*; and in matter (5.), 3*l.* 18*s.* As to (7.) each of the detailed bills relating to matters (1.) to (5.) contained items at the end in respect of disbursements in lieu of being put at the lump sum of 2*l.* 15*s.* as in the gross sum bill. The client having taken out a summons to tax, the taxing-master disallowed no items of the detailed bills, but he held that the solicitors were entitled only to the amount of the gross sum bills relating to matters (1.), (3.) and (5.), and not to the amount of the detailed bills relating to those matters. Objections by the solicitors to this taxation having been overruled, the solicitors issued a summons to review the taxing-master's certificate. Tucker J. dismissed the summons, and the solicitors appealed.

(1) By the Solicitors' Remuneration (Gross Sum) Order, 1934, made under s. 56 of the Solicitors Act, 1932: 1. "Without prejudice to the power possessed by the court under the Solicitors Act, 1932, or otherwise or to the powers conferred upon the solicitor or the party chargeable with the bill under s. 66 of the Solicitors Act, 1932, the remuneration of a solicitor in respect of all business regulated by cl. 2 (c) of the General Order of 1882, as amended by any subsequent General Order, may at the option of the solicitor

"be by a gross sum in lieu of by
"detailed charges: Provided that
"within six months after delivery
"of a charge made under this order,
"whether it has been paid or not,
"the client may require that a
"detailed bill of charges shall be
"delivered and the solicitor shall
"thereupon comply with the re-
"quisition and any bill so delivered
"shall be subject to taxation as if
"the provisions of this order with
"respect to the regulation of
"remuneration by gross sum had
"not been made."

Geoffrey Cross for the solicitors. Formerly, a solicitor could deliver a gross sum bill, but, on demand, had to deliver a detailed one, which could be taxed. If the bill as taxed amounted to a larger sum than the gross sum, the solicitor could not recover more than the gross sum : *In re Tilleard* (1), followed in *In re Russell, Son & Scott* (2). By the Solicitors' Remuneration Act General Order, 1920, a solicitor might be remunerated by a gross sum, but he had to deliver a detailed bill of charges on demand, and it could be taxed. This was revoked by the Solicitors' Remuneration (Gross Sum) Order, 1934, which was in similar terms. The effect is to wipe out the gross sum bill as if "the provisions of this order with respect to the regulation of remuneration by gross sum had not been made," with the result that the detailed bill is not explanatory of the gross sum bill, but is a substituted bill for all purposes.

A. Pocock for the client. The practice pursued in this case has always been followed both before and after 1920, and the court will be reluctant to alter long-established practice. A solicitor who has delivered a bill cannot substitute for it another in which he increases the amount, the detailed bill delivered on request being merely explanatory of the gross sum bill. The object of the orders of 1920 and 1934 was to regularize the position of the gross sum bill and make it taxable. Had it been intended to alter the practice, the orders would have done so specifically.

SCOTT L.J. In this appeal a question is raised involving a principle of importance with regard to the taxation of solicitors' costs. Until the making of the Solicitors' Remuneration Act General Order, 1920, a solicitor could only recover his charges under the statutory provisions affecting him if he gave a detailed list of his charges and delivered that list as his bill of costs to his client. In several cases, of which *In re Tilleard* (1) may be regarded as representative, it was held that under the practice as it then was, if a solicitor had charged his client with a gross sum which the client was not willing to pay, he being under no obligation to do so at law, the client could demand a detailed bill, and if, on taxation of the detailed bill, the total sum amounted to more than the original gross sum charged by the solicitor, the client was only obliged to pay the amount of the original gross sum. Whether this

(1) (1863) 32 Beav. 476.

(2) (1886) 55 L. T. 71.

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Scott L.J.

decision would be upheld to-day in the House of Lords is immaterial to the decision of the case before us.

The present position is that by the Solicitors' Remuneration (Gross Sum) Order, 1934, the remuneration of a solicitor may, at the option of the solicitor, be by a gross sum in lieu of by detailed charges: "Provided that . . . the client may require "that a detailed bill of charges shall be delivered and the "solicitor shall thereupon comply with the requisition and any "bill so delivered shall be subject to taxation . . ." Prima facie, that means that the taxed detailed bill would take the place of the original bill for a gross sum for all purposes and the solicitor would be entitled to payment of its amount, and that, in my view, is the meaning of the order. That construction is supported by the words which follow: "as if the "provisions of this order with respect to the regulation of "remuneration by gross sum had not been made." In other words, the earlier bill for a gross sum is ruled out for all purposes. I cannot see how the cases which were decided before the making of the Solicitors' Remuneration Act General Order, 1920, the predecessor of the order of 1934, can affect the construction of the language used in those orders which seems to me to be clear. In any event I find it difficult to follow the principle on which those cases were decided since it is not wholly consistent with natural justice. Both the taxing-master and Tucker J. accepted the principle that the old practice laid down in *In re Tilleard* (1), that the gross sum must be treated for all purposes as a maximum limit to the amount of the solicitors' remuneration, applied under the order of 1934. I cannot accept that view, and I think the appeal should be allowed.

MACKINNON L.J. I agree. I have great doubt whether the decisions in *In re Tilleard* (1) and the cases which followed it can be justified on principle, but it is unnecessary to consider whether or not that is so, because I am satisfied that those cases have no application to the present matter. Here, the detailed bill was not merely an explanation of a previous request for payment of a gross sum put forward by the solicitors. It was an alternative charge insisted on by the client pursuant to her rights under the Solicitors' Remuneration (Gross Sum) Order, 1934, and the client exercised her further right under the order to have that detailed bill taxed. If the

(1) (1863) 32 Beav. 476.

client exercises those rights, she must bear the burden imposed on her by the order by paying that amount of the detailed bill which is found on taxation to be correct without taking into account the amount of the gross sum first asked for by the solicitor.

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GODDARD L.J. I agree. I share with my lords their doubt of the correctness of the decisions before the making of the Solicitors' Remuneration Act General Order, 1920, but those decisions are immaterial on the question of the construction of the orders of 1920 and 1934, the effect of both of which is the same. If a solicitor delivers a gross sum bill and his client asks for a detailed bill, the solicitor must withdraw his gross sum bill and it is treated as if it had never been delivered. The detailed bill becomes the material bill and it is subject to taxation. That is relevant on the issue of payment of costs where the bill of the solicitor is reduced by more than one sixth. The resulting position seems to me to be just and reasonable. The client who, not being satisfied with the gross sum charged, demands a detailed bill of charges must put up with the consequences, if the amount of the detailed bill turns out to be larger than the gross sum first charged. The client should remember the advice given long ago, which is especially true to-day: "Agree with thine adversary quickly, whiles 'thou art in the way with him.'"

Appeal allowed.

Solicitors for the solicitors: *J. N. Nabarro & Sons.*

Solicitors for the client: *Heywood & Ram.*

PETERS *v.* PRINCE OF WALES THEATRE
(BIRMINGHAM), LIMITED.

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 Oct. 12, 13,
14, 26.

Landlord and tenant—Damage by water—Tenant's shop part of landlord's building—Damage to shop from fire extinguishing apparatus in building—No negligence by defendants—Implied assent of tenant to installation.

The plaintiff leased from the defendants shop premises forming part of the defendants' building which contained a theatre and a rehearsal room, the defendants covenanting (*inter alia*) to keep the exterior of the demised premises in good and tenantable repair and condition. When the lease was granted the plaintiff knew

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that the rehearsal room was fitted with a system of sprinklers, which also extended to his shop, designed to discharge automatically large quantities of water in case of fire. Owing to an exceptionally severe frost, and not to any default on the part of the defendants, the sprinklers burst and water percolated to the plaintiff's shop, damaging his goods. In an action by the plaintiff against the defendants for damages:—

Held, (1.) that the defendants had not broken their covenant to keep the exterior of the demised premises in repair since the covenant must be construed as referring to every exterior part of the demised premises, to the exclusion of what was not demised, and the sprinklers were no part of the demised premises; (2.) that the doctrine in *Rylands v. Fletcher* (1868) L. R. 3 H. L. 330 did not apply as the plaintiff had impliedly consented to the presence of the sprinklers. The plaintiff's claim, therefore, failed.

APPEAL from Hallett J.

By a lease dated October 8, 1938, the plaintiff took from the defendants a shop and six rooms in a building belonging to the defendants at 34 Broad Street, Birmingham, for a term of seven years, the defendants covenanting (inter alia) to keep the exterior of the demised premises in good and tenantable repair and condition. The building contained, in addition to the shop and rooms demised to the plaintiff, the Prince of Wales Theatre, and over the plaintiff's premises was a large room and an alcove, known as the rehearsal room, which was used by the defendants when stage plays were being produced at the theatre. When the lease was granted there was, to the plaintiff's knowledge, a sprinkler system installed in the rehearsal room as a precaution against fire and it extended to the plaintiff's shop. The system had become familiar and was in use in a considerable number of buildings and shops in Birmingham, and the regulations of the local authority required that the system should be installed in premises used as theatres. Sprinkler heads were attached to water pipes, each head containing a ball controlled by a small bar of metal which easily melted if a fire took place, water thus being released. On the other hand, if ice formed in the sprinkler head the expansion was liable to shift the ball so that when a thaw came water might flow. In January, 1940, a thaw followed a severe frost, and water poured from the sprinklers, percolated into the plaintiff's shop, and damaged his stock. In an action in which he claimed damages from the defendants, three points were made on his behalf: (1.) that the defendants had broken their

covenant to keep the exterior of the demised premises in good condition; (2.) that the bursting of the sprinklers was due to the defendants' negligence; (3.) that the doctrine in *Rylands v. Fletcher* (1) applied. Hallett J. found against the plaintiff on the first two points, but decided in his favour on the third, awarding him damages to be assessed. The defendants appealed.

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Blanco White K.C. and *E. G. H. Beresford* for defendants.
Beyfus K.C. and *R. H. Norris* for plaintiff.

Cur. adv. vult.

1942. Oct. 26. The judgment of the court (SCOTT, MACKINNON and GODDARD L.JJ.) was read by GODDARD L.J., who stated the facts, expressed the agreement of the court with the finding of Hallett J. on the issue of negligence, and continued: On the first point advanced on behalf of the plaintiff we are of opinion that the right view was taken by Hallett J. The covenant is to repair "the exterior of the demised premises." This, in our opinion, must be construed as meaning every exterior part of the demised premises—in other words, as excluding what is not demised. The sprinklers, the bursting of which caused the damage, were no part of the exterior of the demised premises, and there is no suggestion that any part of the premises demised was out of repair.

I now turn to the ground on which Hallett J. has held the defendants liable. He applied the doctrine of *Rylands v. Fletcher* (1), and he put it thus. This is not a case of the escape of water brought on the premises merely for domestic purposes, and the sprinkler system cannot be treated as analogous to ordinary water-closets, lavatories and baths. It is a system in which there is potential danger of the escape of an enormous quantity of water. Accordingly, he held that the case was not within the exception to the rule which has been established by a series of cases of which *Carstairs v. Taylor* (2) is the earliest and *Rickards v. Lothian* (3), perhaps, the leading example. It is necessary, therefore, to examine the cases with some care. Before doing so, however, it may be observed that, as reference is made in most of these

(1) (1868) L. R. 3 H. L. 330.

(3) [1913] A. C. 263.

(2) (1871) L. R. 6 Ex. 217.

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authorities, at any rate, to what is an ordinary or usual user of premises in relation to the storage of water thereon, it is of importance to notice that the judge has found, and was well justified in finding, that this system was not uncommon in large business premises. He referred also to Sir John Salmond's observation that while the distinction between what is usual and what is exceptional or abnormal may be justifiable in principle, it is very difficult to apply in practice. In the present case, however, we are concerned with a building the greater part of which was, at the time of the damage, used as a theatre, where not only must special precautions against fire be taken but these sprinklers are by the local authority required to be fitted. Having regard, therefore, to the nature of the building, the installation would appear to be ordinary and usual, although, in our opinion, this is not the decisive feature of the case.

Carstairs v. Taylor (1) established the first exception to *Rylands v. Fletcher* (2). (It is earlier in date than the often quoted *Nichols v. Marsland* (3), which created another exception.) The plaintiff occupied the ground floor of a warehouse and the defendant, from whom he hired it, occupied the upper floor. Rain water percolated into the plaintiff's floor owing to the guttering being rendered defective by rats, but no negligence was found. It was held that the plaintiff had no cause of action. Kelly C.B. put his judgment on the ground of vis major. Bramwell B., with whom Pigott B. concurred, relied on the roof being for the common protection of both plaintiff and defendant and the collection of water running from it was for their joint benefit. The decision of Martin B. was that one who takes a floor in a house must be held to take the premises as they are and cannot complain that the house was not constructed differently. The next case in point of date is *Ross v. Fedden* (4), a case between occupiers of different parts of the same building which they held under a common landlord, there being no contractual relationship between the parties. Water percolated into the plaintiff's premises by reason of a water-closet in the defendant's part being blocked, and again no negligence was found. The judgments are short, approving, as they do, the judgment of a deputy county court judge which is reported at length. He had based his decision in favour of the defendant on the

(1) L. R. 6 Ex. 217.

(2) L. R. 3 H. L. 330.

(3) (1876) 2 Ex. D. 1.

(4) (1872) L. R. 7 Q. B. 661.

words of Martin B. to which I have just referred. Then comes *Humphries v. Cousins* (1), in which the plaintiff succeeded although no negligence was found. The parties were adjoining owners and sewage from the defendant's house escaped into that of the plaintiff. The court, consisting of Denman and Lindley JJ., gave judgment for the plaintiff and expressly distinguished the case from *Ross v. Fedden* (2) and *Carstairs v. Taylor* (3) on the ground that in those cases the parties occupied different storeys of the same house, while in the case before them they were dealing with occupiers of adjacent properties. *Anderson v. Oppenheimer* (4), was another case where a landlord and tenant occupied different floors in one building, both supplied with water from a common cistern which overflowed. Judgment was given for the defendant, Brett L.J. rejecting the argument that *Rylands v. Fletcher* (5) applied on the ground that water was stored for the common benefit of both, and Cotton L.J. agreeing with him. Thesiger L.J. went on much the same lines as Martin B. in *Carstairs v. Taylor* (3). He said (6): "The plaintiffs took the premises subject to the circumstance, that there was an apparatus for the supply of the whole house with water, and that there were a main pipe from the cistern and branch pipes to each of the floors. They took the lease upon this footing, and they would have been entitled to complain if the supply of water failed. They took the benefit and must take the burden. The defendant is not liable upon either the principle of *Rylands v. Fletcher* (5), or upon the words of the covenant." A case almost identical on its facts with the last is *Blake v. Woolf* (7), where the judgment of the Divisional Court was delivered by that most learned and accurate lawyer, R. S. Wright J. He said (8): "In this case the plaintiff, by taking these premises with water laid on to them and accepting his supply of water from the defendant's cistern, must be taken to have assented to water being kept on the premises by the defendant." He then cited the cases to which we have referred, and held that as there was no negligence proved the defendant was not liable. The same result followed in *Rickards v. Lothian* (9), although in that

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(1) (1877) 2 C. P. D. 239.

(2) L. R. 7 Q. B. 661.

(3) L. R. 6 Ex. 217.

(4) (1880) 5 Q. B. D. 602.

(5) L. R. 3 H. L. 330.

(6) 5 Q. B. D. 609.

(7) [1898] 2 Q. B. 426.

(8) Ibid. 428.

(9) [1913] A. C. 263.

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case the emphasis was laid on the supply of water for water-closets and lavatories being a necessity, and, indeed, a landlord's duty, in modern life. So there is unbroken authority from 1871 to 1913 that where the plaintiff and defendant occupy different floors of one building and water laid on to the building escapes, the party from whose rooms the water escapes is not liable in the absence of negligence.

The latest case on the subject is *Kiddle v. City Business Properties, Ltd.* (1), where it was decided that this matter was now settled law, the reason for which was most clearly stated in the passage from the judgment of Martin B. in *Carstairs v. Taylor* (2). In truth, it appears to depend on consent, and it seems to us that the fact that in most of the cases, at any rate, the benefit of the water or the gutters was common to both parties is really an element, although, no doubt, an important element, in showing that there was consent. The contractual relationship between landlord and tenant, or the willingness of the plaintiff to take a lease of part of a house so constructed that at the time when he takes his lease other occupiers are being supplied with water, removes the case from the sphere of the common law doctrine laid down in *Rylands v. Fletcher* (3). This explains why the plaintiff failed in *Carstairs v. Taylor* (2), and succeeded in *Humphries v. Cousins* (4). A good illustration of the principle which indicates the dividing line is to be found in a judgment of Farwell J. in *Thomas v. Lewis* (5). The plaintiff, a farmer, and the defendant, a quarry owner, were adjoining owners. The plaintiff rented a field adjoining the quarry from the defendant. The working of the quarry caused damage to the field which the defendant had let to the plaintiff and also to a field which was the plaintiff's own property. For the damage to the latter the plaintiff was entitled to recover, but not for damage to the former, for, in taking the field from the defendant, he must be taken to have consented to the quarry being worked in the ordinary way, as it was not to be supposed that the defendant would let the field except on the condition that he should continue to work the quarry. As a tenant the plaintiff had no cause of action. As an adjoining owner he had. *Kiddle v. City Business Properties, Ltd.* (1) is another illustration of the same principle. It is, however, necessary

(1) [1942] 1 K. B. 269.

(2) L. R. 6 Ex. 217.

(3) L. R. 3 H. L. 330.

(4) 2 C. P. D. 239.

(5) [1937] 1 All E. R. 137.

to say a word with regard to *Western Engraving Co. v. Film Laboratories, Ltd.* (1). This case was cited below and it obviously influenced Hallett J. as it was a decision of this court. The parties occupied different floors in the same building and each used them for industrial purposes. The plaintiffs were engravers and the defendants used large quantities of water for washing films, some of which escaped and caused damage to the plaintiffs, who were held entitled to recover on the doctrine of *Rylands v. Fletcher* (2). The report does not set out the facts in any detail and it does not appear whether the defendants' water system was already installed in use at the time when the plaintiffs became tenants of the premises. It is clear that, if it was not so installed, that fact provides a very marked distinction to the cases to which we have been referring in this judgment. Moreover, while it does appear that the court gave as one of their reasons the fact that the water was not on the premises for the common benefit of the parties, it does not appear that it was argued, as it might have been if the water system was there at the time of the demise, that the plaintiffs took the premises as they found them. Then again, it is clear that the court thought that there had been negligence, as appears particularly in the judgment of Scott L.J. In these circumstances, we do not think we ought to regard that case as throwing doubt on the chain of authorities to which I have referred. We agree with the criticism of Hallett J. of the passage in Charlesworth's Law of Negligence, p. 252, where it is stated that "Water brought on the premises for business purposes, as opposed to domestic purposes, gives rise to the liability in *Rylands v. Fletcher* (2), whether or not there is negligence." That is too wide a statement. It is not the purpose to which the water is being put which is decisive. It is that the plaintiff takes the premises as they are, and, accordingly, consents to the presence there of the installed water system with all its advantages and disadvantages.

Applying the principles which we have endeavoured to deduce from the authorities to the present case, the plaintiff took a lease from theatre proprietors of part of the building in which they carried on their theatre. When he took it the sprinkler system was installed and he knew of it. It is not to be supposed that the defendants would have consented to have let to him had he stipulated for the removal of that system.

(1) [1936] 1 All E. R. 106.

(2) L. R. 3 H. L. 330.

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He took the place as he found it for better or worse.¹ Indeed, if common benefit be the material consideration, although, in our opinion, it is not, considering that theatres are generally regarded as buildings exposed to more than ordinary risk of fire, it may well be for the benefit of tenants in the building that the most effective apparatus should exist for dealing with this danger. It is, however, on the implied consent of the plaintiff to the presence of this installation that we base our decision that the doctrine of *Rylands v. Fletcher* (1) does not apply. The appeal must be allowed, and judgment entered for the defendants.

Solicitors for defendants: *Whitlock & Storr, for Pepper, Tangye & Winterton, Birmingham.*

Solicitors for plaintiff: *Berrymans, for T. Haynes Duffell & Son, Birmingham.*

(1) L. R. 3 H. L. 330.

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Oct. 20, 21,
22, 30.

KNUPFFER v. LONDON EXPRESS NEWSPAPERS, LIMITED.

Defamation—Libel—Libel on a class—Action by individual member—Competence—Damages—Amount—Extravagance—Award by judge without jury.

Where defamatory words are written of a class of persons it is not open to a member of that class to say that they were written of him, unless the class is so small or so ascertainable that what is said of the class is necessarily said of every member of it, or unless the words, although they purport to refer to a class, yet in the circumstances of the particular case in fact refer to an individual.

Ruling of Willes J. in *Eastwood v. Holmes* (1858) 1 F. & F. 347 approved.

Observations on the amount of damages to be awarded by a judge in a libel suit.

APPEAL from Stable J.

The plaintiff, who was a Russian, resident in London, claimed damages for a libel which, he alleged, the defendants, who were the proprietors and publishers of a London daily newspaper called the Daily Express had published concerning him. In his statement of claim the plaintiff pleaded that he was "the representative in Great Britain of the group or

"organization known as the ' Young Russian Party ' or " ' Mlado Russ,' " and that in the issue of the Daily Express for July 1, 1941, the defendants had published of him an article which was headed " Hitler's Littlest Kaiser," and contained the following passages : " But the quislings on whom Hitler " flatters himself he can build a pro-German movement within " the Soviet Union are an emigré group entitled ' Mlado Russ ' " or ' Young Russia.' They are a minute body professing a pure " Fascist ideology who have long sought a suitable führer— " I know with what success. Established in France and the " United States, they claim to have secret agents able to enter " or leave the Soviet Union at will. Hitler intends to " nominate a puppet führer from their ranks to replace the " Soviet national leaders of the Kremlin and establish a " reactionary totalitarian serf state on the German and Italian " model. The proposed line of operation is the seducing of " Red Army officers from their allegiance to their country " and with their aid destroying trade unions, co-operative " collective farms, and the Soviet Parliamentary system with " a ruthless massacre of all the present leaders, great and small, " of the Russian people. The vast majority of Russian " emigrés repudiate these people, but Hitler is accustomed to " find instruments among the despised dregs of every com- " munity. He intends Ukrainian pogroms as a starting point " for general anarchy in Russia." The statement of claim continued : " By the said words the defendants meant and " were understood to mean that the plaintiff was " a member and representative of a group whose objects were to assist the enemies of this country and to compass the defeat of Russia in its war with Germany. The defendants, by their defence, denied that the words complained of were reasonably capable of being understood to refer to the plaintiff.

The plaintiff gave evidence that there were branches of the " Young Russia " organization all over the world. The headquarters of the society used to be in Paris, and its head was one Kasem Beg, who was in New York. The plaintiff became a member of the English branch in 1933, assistant representative (under one Bibibiu) of that branch in 1935, and representative of that branch in 1938. There were twenty-four members in England, and an unspecified but a large number of members in other countries. The plaintiff also called as witnesses three Russians resident in England and one British subject. To each of three of these witnesses this

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question was put: "When you read the article to whom "did your mind go?" The first witness answered: "As "far as this country was concerned, to the plaintiff." The second answered: "In the first place I thought it referred to "Mr. Bibibiu, and, indeed, Mr. Knuppfer—Mr. Bibibiu not "so much because he was out of the actual leading of the party "in England." The third (the English) witness answered: "Essentially to Mr. Knuppfer and to Mr. Kasem Beg." Stable J. entered judgment for the plaintiff, awarding him 3500*l.* damages, and the defendants appealed.

Serjeant Sullivan K.C. and *G. O. Slade* for the defendants. The learned judge was wrong in holding that the plaintiff was entitled to maintain an action for libel against the defendants in respect of this article. The plaintiff in a libel action must prove that he is the living individual or is one of the living individuals described, or understood as being described, in the libel. If the publication complained of relates only to the character or conduct of an association of indefinite membership no member can bring an action in respect of that publication because he cannot prove that he was the individual described in the publication. It is true that if the matter is published of an association of limited and defined membership which can only act with the assent of all its members so that any action by the association is joint and several, any of the members can bring an action in respect of that publication, but if an association can act by a majority of its members no member can sue in respect of a libel on the association. In the present case there was no proof of circumstances which gave rise to an innuendo that the words referred to the plaintiff. In their ordinary meaning the words complained of were not capable of a libel on the plaintiff. It was laid down by Willes J. in *Eastwood v. Holmes* (1), that if defamatory words are written of a class of persons it is not open to a member of that class to say that they were written of him. That principle was followed in *Campbell v. Wilson* (2) and in *O'Brien v. Eason* (3). In *Le Fanu v. Malcolmson* (4), although the defamatory matter appeared only to apply to a class of individuals, the plaintiff was able to prove that the libel referred to him.

Valentine Holmes for the plaintiff. The common law test

(1) (1858) 1 F. & F. 347.

(3) (1913) 47 Ir. L. T. 266.

(2) 1934 Sc. L. T. 249.

(4) (1848) 1 H. L. C. 637.

is whether a reader of the article would reasonably think that the plaintiff was the person referred to in it. It is clear from *E. Hulton & Co. v. Jones* (1), that the intention of the writer is immaterial. In the present case there were only twenty-four members of the society in England, and the plaintiff was the only person who devoted the whole of his time to the work of the society, therefore the article was a libel on him. Stable J. applied in this case the principle which was applied in *Cassidy v. Daily Mirror Newspapers, Ltd.* (2). The judge was bound to come to the conclusion on the evidence that the article referred to the plaintiff.

Serjeant Sullivan K.C. replied.

Cur. adv. vult.

1942. Oct. 30. The following judgments were read.

MACKINNON L.J. There is no doubt that if what was written had been concerning a named Russian individual he would have good grounds for claiming damages for libel, but I find myself unable to agree that "on the authorities" the plaintiff was entitled to say that these words were written and published concerning him.

I think that the primary rule of law is that when defamatory words are written or spoken of a class of persons it is not open to a member of that class to say that they are written or spoken of him. This is nowhere laid down more precisely than by that great judge, Willes J., when he said, in 1858: "Assuming the article to be libellous, it is not a libel on the plaintiff; it only reflects on a class of persons If "a man wrote that all lawyers were thieves, no particular "lawyer could sue him unless there is something to point to "the particular individual, which there is not here. There is "nothing to show that the article was inserted with any "special reference to the plaintiff. It does not appear that "the defendant knew of his existence": *Eastwood v. Holmes* (3). That last sentence may need to be deleted by reason of the decision of the House of Lords in *E. Hulton & Co. v. Jones* (1), but all the rest of the quotation is, I think, an entirely accurate statement of the law. The rule so laid down by Willes J. has been followed and applied in two cases in Scotland, and in one case in Ireland, namely, *Wardlaw v.*

(1) [1910] A. C. 20.

(3) 1 F. & F. 349.

(2) [1929] 2 K. B. 331.

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Drysdale (1); *O'Brien v. Eason* (2), and *Campbell v. Wilson* (3). In the second of these the two Irish lords justices refer to and rely on the utterance of Willes J. which I have quoted, and in the third case there is an elaborate and illuminating judgment by Lord Mackay.

There are two further rules of law which may be said to constitute exceptions to the primary rule that where there is defamation of a class a member of that class cannot bring an action. The first is that when the class is so small or so completely ascertainable that what is said of the class is necessarily said of every member of it, then a member of the class can sue. The reason for that is that *every* member of the class, being individually aspersed, can sue, and, therefore, any one of them can. Circumstances in which this rule can be applied may be rare, but an example of its application is *Browne v. Thomson* (4), and I can easily imagine defamatory words about a class, or a body, for example, trustees or directors, or managers, which would, in truth, be spoken of every member of that class or body as an individual, and would, therefore, confer a right of action on each of them. The second exception to the general rule is that, although the words purport to refer to a class, yet in the circumstances of the particular case they in fact refer to one or more individual persons. That is the qualification of the rule to which Willes J. refers when he says "unless there is something to 'point to the particular individual.'" An example of this is *Le Fanu v. Malcolmson* (5). The defamatory matter there was in a letter to a newspaper attacking the owners of factories in Ireland—clearly an aspersion on a class of persons. In another part of the paper there was a passage which narrowed down the locality to Waterford, a place where factories did not abound, and, as I gather, the plaintiffs were the only notable owners of any factory there. It was held, to quote the head-note: "Though defamatory matter may appear 'only to apply to a class of individuals, yet if the descriptions 'in such matter are capable of being, by innuendo, shown to 'be directly applicable to any one individual of that class, 'an action may be maintained by such individual in respect of 'the publication of such matter.'" There is a passage in the opinion of Lord Cottenham L.C. (6) which is particularly in point.

(1) (1898) 35 Sc. L. R. 693.

(2) 47 Ir. L. T. 266.

(3) 1934 Sc. L. T. 249.

(4) 1912 S. C. 359.

(5) 1 H. L. C. 637.

(6) *Ibid.* 664.

These, I think, are the relevant principles. How do they apply to this case? Prima facie, these defamatory words are spoken of a class—the members of the Young Russian Society. An action cannot be brought by a member of that class under the primary rule unless he can bring it within the second or third rule. Clearly, the plaintiff cannot bring it within the second rule. On his own evidence there are hundreds, if not thousands, of members all over the world, and I think, almost equally clearly, the plaintiff failed to establish that the case came within the third rule. There was nothing to show that the words about the class referred to the plaintiff as an individual. In fact, the article never mentioned the existence of any branch of the society in England at all. It spoke of it as a minute group established in France and in the United States. All the plaintiff's witnesses could say was that they thought the article referred to the plaintiff because they happened to know of him as a prominent member of the society in England. In the same way every one of the thousands of members all over the world might be able to call a friend to say that he thought it referred to that member because he knew he was a member of the society.

For these reasons I think that this action should have been dismissed and that this appeal must be allowed. That conclusion makes it unnecessary for me to deal with the defendants' alternative contention that the damages awarded were excessive and should be reduced. But I am tempted to make some observations on this topic. It is true that damages for defamation may be punitive, and need not be limited to any actual pecuniary loss that a victim can prove he has suffered. It is notorious, however, that juries have often awarded utterly extravagant sums in such cases. Under our present arrangements such cases are heard by a judge alone, sitting without a jury. I cannot think it is right for a judge, when he has to assess the damages, to attempt to attune his mind to what he imagines would be the extravagant impulse of a jury. The plaintiff and his witnesses in this case spoke of his respectability, and of the falsity of the aspersions on his society. The percentage of the readers of this article who knew the plaintiff must be an exceedingly minute figure, and they, on the plaintiff's own evidence, would know that its assertions were rubbish. In short, it is difficult to conceive that, if the article did refer to the plaintiff, it would cause him any appreciable pecuniary loss. I, therefore, think that to

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give him 3500*l.* was an extravagance that the most reckless jury would hardly have achieved, and one which should not have been committed by a judge sitting alone. By how much I think it should have been reduced, if liability had been established, it is unnecessary for me to indicate.

GODDARD L.J. On July 1, 1941, the Daily Express published in London an article from their correspondent in Ankara entitled "Hitler's Littlest Kaiser." Its object was to expose and condemn persons and organizations in countries at war with Germany who were supposed to favour the enemy. It is not without importance to notice that, although reference is made to many countries in Europe and also to the United States, from first to last no mention is made of Great Britain. Among the organizations thus denounced is one referred to as an emigré group called "Mlado Russ" or "Young Russia," which is said to be a minute group established in France and the United States. The plaintiff is a member of this party.

The question for this court is whether the words of which complaint is made are capable of supporting an innuendo that they refer to the plaintiff. So far as the facts proved in evidence are concerned, it seems that this party originated in Paris under the auspices of a Mr. Kasem Beg. According to the plaintiff, so far from its being a minute body, it has an exceedingly large membership on the continent and also, I gather, some adherents in America. Its constitution is said to be a hierarchical structure, which sounds imposing, but, apparently, means no more than that there are various persons employed by the party who occupy positions of varying responsibility, and that on all matters of policy Mr. Kasem Beg had the last word, or to use a colloquial expression, "what he says goes." The plaintiff is no doubt an enthusiastic supporter of the movement. The party obviously takes itself very seriously. It issues membership cards to its members which contain even more information as to the individuals to whom they are given than one would expect to find on passports in war-time and about as many rubber stamps, and the document appointing the plaintiff as representative in Great Britain is authenticated by someone who signs himself "The Head of the Administration Department of the General "Secretariat," which sounds almost as though it emanated from the League of Nations instead of from a purely unofficial body. In spite of the plaintiff's efforts and enthusiasm

"Young Russia" does not seem to have flourished in Great Britain. Its growth has been slow, almost feeble—surprisingly so considering that membership entails no financial obligation in the shape of a subscription. While the plaintiff says there are in Paris several hundred members, Great Britain can produce but twenty-four, although whether that number should be increased to twenty-five if we include the plaintiff I do not know. Its office was what the plaintiff modestly describes as his "little flatlet," where he dealt with some three or four letters every week-day, and from which he wrote sometimes to government departments. Many people do. There was a newspaper, printed and published abroad, called Bodrost, under the auspices of the society and at one time purchasable in this country, though when it was last on sale no-one seems to know, and a magazine called Young Russia made irregular appearances for a time but had died for lack of funds before the plaintiff became the official representative for Great Britain. But, of course, the plaintiff had friends and acquaintances among the Russian colony in this country who knew and, I have no doubt, were often reminded of the plaintiff's connexion with this society. Some at least of his English friends also knew of it. They, apparently, found it easier to refer to him as "the chap who 'was the Young Russian party'" than by his Russian name, although that is not very difficult to pronounce. And so, says Mr. Holmes, ignoring the other twenty-three or twenty-four, the plaintiff was the Young Russian Party, a party, that is, of one so far as these islands are concerned. No wonder then that Great Britain was not mentioned in the Daily Express article.

I have dealt with these facts at some length because it is obvious that the plaintiff's real motive in bringing this action is to advertise and eulogize his organization which in this country has never emerged from obscurity. He was quite frank about it. He was asked in cross-examination whether he was drawing a distinction between himself in his private capacity and as being bound up with the Young Russian Party. His answer was "In this matter I am concerned only 'with the Young Russian Party.'" In the letter which he wrote to the defendants as soon as the article appeared it is only at the end that he suggests that reflections on the party are reflections on him personally. The theme of the letter is a vindication of Young Russia. When the defendants offered to publish a statement that the article could have no possible

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reference to him as the representative of the society in Great Britain, and that they unhesitatingly accepted his statement that he had no pro-German sympathies, he refused to accept this without a withdrawal of all suggestions against "Young Russia." This attitude of the plaintiff really summarizes the question which has to be determined in the appeal. On the one hand, Serjeant Sullivan submits that when the matter alleged to be defamatory refers only to the corporative or collective character of an indefinite body, such as a political party or organization, no member of that body can maintain an action. He concedes that, if the matter complained of can be shown to be aimed specially at the plaintiff, although he be not mentioned by name, an action will lie. Mr. Holmes, on the other hand, maintains that the only test is, whether a reasonable reader would think that the words applied to the plaintiff.

In my opinion, the real question is whether the words are capable of supporting the innuendo that they were written of and concerning the plaintiff. As the court has to determine whether the words are capable of bearing a defamatory meaning, so it has also to decide whether they are capable of being defamatory of the plaintiff. Now, in one sense it is true that an attack on a society must be an attack on its members, but it is not the law that for that reason every member has a cause of action. There must be something to show that it is the plaintiff at whom the article is aimed. To some extent, no doubt, the question of the numbers or size of the body criticized is of great importance. To accuse a jury or a body of trustees of corruption would necessarily impute corruption to all, but to say that a political party is corrupt cannot mean that every member of that party is accused of corruption, even though the minds of voters in a constituency might, to use Mr. Holmes' expression, turn to their member who happened to belong to that party. Were it said that the directors of the X railway company sweated their servants, perhaps all the directors could sue to vindicate themselves as employers, but were it said that the X railway company were sweaters it is absurd to suppose that every stockholder could sue.

In the English reports there are singularly few reported decisions on the subject. *Le Fanu v. Malcolmson* (1), which happened to be an appeal from the Irish courts, is a leading case on the subject. It was emphasized that it is not necessary to mention the plaintiff by name if, on a fair reading of the

(1) 1 H. L. C. 637.

libel, it can be seen that the attack is on the plaintiff, or, perhaps, I should say, "may be" on the plaintiff as it is for the jury to say whether in fact it is. In that case there was ample evidence to show that, while the article in question referred to Irish factories, it was the plaintiff's factory that was specially attacked. Contrast that case with *Eastwood v. Holmes* (1). The plaintiff was a dealer in antiques and sold a great many figures called pilgrim signs which he professed to have been discovered in excavating in the Thames. The article, which was the subject of the action, denounced pilgrim signs which were being offered for sale both in London and the country and which were said to have been recovered from the Thames as "recent fabrications" and described the business as "a gross attempt at deception and extortion." Willes J. directed a non-suit, that is, he withdrew the case from the jury, holding that the words were incapable of being a libel on the plaintiff. He is reported as saying: "It is not a libel on the plaintiff; it reflects only on a class of persons dealing in such objects." Later he said: "There is nothing to show that the article was inserted with any special reference to the plaintiff." He added: "It does not appear that the defendant knew of his existence." This must now be regarded as an immaterial consideration, in view of *E. Hulton & Co. v. Jones* (2), which is the case on which Mr. Holmes naturally most strongly relies. Now, as I understand that decision, it is that, if a person so depicts an individual that others reasonably believe that the character drawn is the plaintiff, it is no answer to say that the character was in the author's mind merely fictional. The words complained of in that case attributed certain conduct to a person, fictitious in the author's mind, who was given the name of a living person who had had employment on the very newspaper in which the words appeared. A consequence, which it was decided was a natural consequence, was that persons who knew him and knew of his previous connexion with that paper, assumed that he was the subject of the story. While accepting to the full the principle of the decision—which may without, I hope, any disrespect, be described as adding a terror to authorship—it is not one which this court at any rate need extend. *Cassidy v. Daily Mirror Newspapers, Ltd.* (3) added nothing to the law in this respect. It was the application of the law to

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(1) 1 F. & F. 347, 349.

(3) [1929] 2 K. B. 331.

(2) [1910] A. C. 20.

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the particular facts of that case which has not received universal approval from the profession and text book writers, and was, indeed, the subject of a vigorous dissenting judgment from Greer L.J. I do not believe that the House of Lords intended to lay down any principle in conflict with what Willes J. held in *Eastwood v. Holmes* (1), except in regard to the one sentence in his reported judgment to which I have referred and which was, in truth, obiter.

The court must, in my opinion, pose the question: "Is 'the article an attack on the policy or objects of a society' or association, or is it an attack on an individual?" Serjeant Sullivan put it neatly in his argument when he submitted that, if the words are a general reflection of a defamatory character on a class or association, they are not actionable at the suit of a member of that class or association. To hold the contrary would, indeed, involve consequences of a serious character. A writer at the present time might well think it a public duty to call attention to what he in all honesty believes to be the treasonable activities of some organization in occupied territory. If it so happens that there is some person in this country who is or has been a member of the organization, he could then bring an action at a time when it would be quite impossible for the defendant to bring the necessary evidence to this country to show, if he desired so to do, that his statements were true. If he attacks an individual in this country, whether he knows that he is here or not, he must put up with the consequences. If at any time he attacks a corporate body the latter may sue, subject to certain considerations which apply to libel on corporations: see *South Hetton Coal Co. v. North-Eastern News Association* (2), but not the individual corporators unless one or more can show that he or they are singled out for attack under the guise of an attack on the body. The same is, in my opinion, true of an attack on an unincorporated body. The class may be so small or easily identifiable, as in the Scottish case of *Browne v. Thomson* (3), that an attack on the class is an attack on each member. That must depend on the circumstances of any particular case. While, as I have already said, authority on the point is scanty in the English reports, I think this view has generally and rightly been adopted by the leading text book writers and support for it is to be found in the judgment of Holmes L.J. in *O'Brien v. Eason* (4).

(1) 1 F. & F. 347, 349.

(2) [1894] 1 Q. B. 133.

(3) 1912 S. C. 359.

(4) 47 Ir. L. T. 268.

Applying the principle which I have endeavoured to elucidate to the present case, I have no doubt that the article in which the words complained of appear is an attack on the general character, policy and activities of an association and not on any individual member of it, and that is exactly how the plaintiff himself regarded it. Accepting to the full the honesty of the witnesses called by him, their evidence really comes to no more than that on reading the article they thought there was an attack on "Young Russia" with which the plaintiff was prominently connected, not that there was an attack on the plaintiff. I would, therefore, allow the appeal and hold that the plaintiff has proved no cause of action.

Had it been necessary to consider whether the damages were excessive, I should have held without hesitation that they were out of all proportion to the damage actually done. For myself, I find it difficult to subscribe to the view that a judge may give less than he thinks a reasonably minded jury would give because he can express his opinion on the conduct of the parties in words while a jury can only do so by the amount that they award. If as a war-time measure a litigant must dispense with a jury he ought not in my opinion, so far as is humanly possible, to be at any disadvantage for that reason, but as there are limits to the powers of a jury as regards damages, so there are to those of a judge. There must be some reasonable relation between the wrong done and the solatium applied, and to this case I would apply the words of Hamilton L.J. in *Greenlands v. Wilmshurst* (1), quoted by Scrutton L.J. in *Tolley v. J. S. Fry & Sons, Ltd.* (2). He said: "Still, in my opinion by no formula or manipulation "can 1000*l.* be got at. For any damage really done, 100*l.* was "quite enough; double it for the sympathy; double it again "for the jury's sense of the defendants' conduct, and again "for their sense of Mr. F. E. Smith's. The product is only "800*l.*" I think I would have started with the same figure as did Hamilton L.J. but I should not have multiplied it so many times.

Appeal allowed.

Solicitors for defendants: *Shirley Woolmer & Co.*

Solicitors for plaintiff: *Hasties.*

(1) [1913] 3 K. B. 507, 532.

(2) [1930] 1 K. B. 467, 476.

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Emergency legislation—Control of employment—Scheduled undertaking—Termination of service by employer—Permission of national service officer—Appeal by employee—Cancellation of permission—Resumption of work by employee—Right to wages for period from termination to resumption of employment—Essential Work (General Provisions) Order, 1941 (St. R. & O., 1941, No. 302), art. 5 (3.).

The plaintiff was employed by the defendants, who were an undertaking scheduled under the Essential Work (General Provisions) Order, 1941. On November 13, 1941, the defendants applied to the national service officer, under art. 4 (1.) (a) of the order for permission to discharge the plaintiff. On November 22, the national service officer gave his permission, and the defendants gave the plaintiff a week's notice to terminate her employment. She was paid her wages up to November 29. On November 24, the plaintiff requested the national service officer to lodge an appeal before the local appeal board, under art. 5 (1.) of the order. On December 12 her appeal was heard, and on December 15 the national service officer, acting under art. 5 (3.) of the order, cancelled the permission which he had given for her discharge. On December 18, she resumed her work with the defendants. The plaintiff claimed to be paid her wages for the period from November 29, when she left her employment, to December 18, when she resumed it:—

Held, that the plaintiff was not entitled to be paid her wages for the period in question.

APPEAL from Westminster county court.

The facts are set out in the headnote. The plaintiff brought an action in the county court for her wages and allowances from November 29, 1941, to December 18, 1941, and the county court judge decided in her favour. The defendants appealed.

Vick K.C. and *J. B. Herbert* for the defendants. The decision of the county court judge would amount to a complete variation of the ordinary law of master and servant, and there is nothing in the material statutory rules and orders to justify such a variation. During the period from November 29 to December 18, the plaintiff was not rendering any service to the defendants, and she is, therefore, not entitled to be paid any wages in respect of that period. The national service

officer might have directed the reinstatement of the plaintiff, under art. 5 (3.) of the order of 1941 (1), in which case she clearly would not have been entitled to the wages which she claims, and the defendants should not be placed in a worse position than they would have been had he so directed.

The Essential Work (General Provisions) Order, 1942 (St. R. & O., No. 371) (2), did not come into force until March 9, 1942, and can have no direct bearing on this case, but it may be noted that art. 4 (5.) of that order specifically provides that the dismissal of a specified person for serious misconduct shall, in the first instance, be provisional only. The need for such an express provision supports the contention of the defendants in the present case.

W. D. Roberts for the plaintiff. Despite the notice given by the defendants to the plaintiff to terminate the contract of employment, that contract subsisted until the time allowed for appeal to the local appeal board had expired, or, in the event of an appeal being lodged, it had been disposed of and the national service officer had announced his intention in regard to the cancellation or otherwise of the permission which he had granted to terminate the contract. The word "cancel" in art. 5 (3.) of the order of 1941 should be construed so as to give this effect. If the national service officer had directed the reinstatement of the plaintiff under art. 5 (3.), it would have involved her being placed in all respects in the position in which she was before her employment was terminated, and, consequently, being paid her wages during the relevant period. If the view of the defendants were to be accepted,

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(1) By art. 4 of the Essential Work (General Provisions) Order, 1941: "(1.) Subject as hereinafter provided, where the name of an undertaking has been entered in the Schedule of Undertakings and a certificate has been served upon the person carrying on that undertaking, the following provisions shall apply:—
"(a) The person carrying on the undertaking shall not terminate (except for serious misconduct) the employment in the undertaking of any person employed therein . . . except with the permission in writing of a

" national service officer."

By art. 5 (3.): "The national service officer . . . may cancel any permission already given, or grant or refuse to grant any permission, or direct any person who has left his employment to return to it, or direct the reinstatement of any person who has been dismissed—(a) under any permission so cancelled as aforesaid . . ."

(2) Art. 5 (3.) of the Essential Work (General Provisions) Order, 1942, re-enacts the material words of art. 5 (3.) of the Essential Work (General Provisions) Order, 1941.

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Vick K.C. replied.

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1942. Nov. 19. LORD GREENE M.R. read a judgment in which he stated the facts, read arts. 4 (1.) (a), (b), (c); 4 (4.); 5 (1.), (2.), (3.), of the order of 1941, and continued: The question raised by this appeal is one of general importance, but the answer to it, in my opinion, does not admit of doubt. The argument presented to us on behalf of the plaintiff was to the effect that, notwithstanding a notice to terminate the employment given pursuant to permission granted by the national service officer, the contract of employment remains in full force until either (a) the fourteen days allowed for appeal to the local appeal board have expired, or (b) if such an appeal has been brought, the appeal has been dealt with and the national service officer has intimated his decision to cancel or not to cancel his permission under art. 5 (3.). This, it was said, is the necessary effect of the use of the word "cancel." It was not argued that the contract of employment was terminated by the notice and that the effect of the cancellation was to invalidate the notice ab initio. Such an argument would clearly be untenable, since it would mean that during the period between the expiration of the notice and the cancellation of the permission no contract of employment would, in fact, be in existence. The employee would not be bound to render any services and the employer would not be liable to pay any wages, and to say that by reason of the cancellation the employer becomes liable to pay wages in respect of a period during which he had no right to demand any services would be absurd. No such argument was advanced by counsel for the plaintiff, and I only mention it to show that it has not been overlooked.

The argument which was actually advanced is one which I find it impossible to accept, since it cannot be reconciled with the language of the order of 1941. To explain my reasons, it is necessary, in the first place, to examine the language of art. 5 (3.) of the order. That language appears at first sight to lay down a number of alternative courses which are to be open to the national service officer, but a closer examination shows that some of them are not alternatives at all. The powers there given fall into two groups: first, the power to

cancel any permission already given or to grant or refuse permission; secondly, a power (in the case of an employee) to direct him to return to his employment and a power (in the case of an employer) to direct the reinstatement of any person who has been dismissed. The power to direct reinstatement is clearly and admittedly not limited to cases of alleged serious misconduct, since one of the cases where reinstatement can be ordered is where a permission has been cancelled, and it is only in cases where permission to terminate employment has been asked for and given—not in cases of dismissal for serious misconduct—that any cancellation of permission can take place. If the power to order reinstatement were confined to cases of dismissal for serious misconduct, there would be no power in the order to direct reinstatement by the employer in other cases corresponding to the power to direct the employee to return to his employment. The use of the word “dismissed” to cover both dismissal for serious misconduct and termination of employment by notice in the ordinary way is no doubt due to inartistic draftsmanship, since the word “dismissal” is only used elsewhere in the order in relation to serious misconduct. Art. 4 (1.) (a), however, shows that “dismissal” for serious misconduct is included in the phrase “termination of employment,” and it appears that the two expressions “dismissal” and “termination of employment” are used indiscriminately.

Now, the powers given by art. 5 (3.) and contained in the second group are not (except in the case of serious misconduct) alternative to the powers contained in the first group, since they are only exercisable where the power of cancellation given in the first group has been exercised, and they are, in truth, ancillary to the exercise of that power. It is, accordingly, contemplated that cancellation of permission may require an order to return to the employment or an order for reinstatement in the employment, as the case may be. No such order would be required if, according to the argument presented on behalf of the plaintiff, the contract of employment had never come to an end.

But there are other, and, perhaps, more cogent arguments. Art. 4 (1.) (a) makes it clear that the employment can lawfully be terminated once permission by the national service officer is given. Art. 4 (1.) (c), which prescribes a minimum length of notice, would be absurd if, in truth, the notice could not

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become effective until the expiration of a period of at least fourteen days—the time allowed for appealing—and possibly several weeks after the giving of the permission. Lastly, art. 4 (4.) provides in terms that, subject to the minimum length of notice, the terms of the contract of employment with regard to giving notice and the length of the notice are to remain in force. Thus, if the contract provides for fourteen days' notice, notice of that length must be given, and on its expiration the contract is to be terminated. This paragraph would be inoperative in such a case if the argument for the plaintiff were correct.

The fact is that this is an endeavour to extract from the word "cancel" a meaning which in its context it is quite incapable of bearing. It involves writing into the order of 1941 words to the effect that, notwithstanding any permission given by the national service officer, and notwithstanding any notice to terminate the employment given pursuant thereto, the contract of employment is to remain on foot until either the time for appealing has expired or, if an appeal is lodged, the local appeal board has made its recommendation and the national service officer has notified his decision. The implication of such words would be quite inconsistent with the language of the order, and is inadmissible. The appeal is allowed.

DU PARCQ L.J. I agree with the judgment which has just been delivered.

LORD GREENE M.R. I am authorized by Lewis J. to say that he also agrees with the judgment which I have delivered.

Appeal allowed.

Solicitors for plaintiff : *Breeze, Benton & Co.*
 Solicitors for defendants : *Merrimans.*

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 BURGESS *v.* BEETHOVEN ELECTRIC EQUIPMENT,
 LIMITED.

Nov. 19, 20.

Practice — Pleading — Particulars — Intention or state of mind —
R. S. C., O. XIX., r. 22.

In an action in which the plaintiff claimed commission under an agreement by which he was to use his best endeavours to obtain government contracts for the defendants, the defendants pleaded (inter alia): "The alleged agreement was intended by the plaintiff to be carried out by the offer by him of bribes, reward or other inducement to government officials to induce favour to be shown to the defendants, and the said agreement was illegal and void or is voidable, and is against public policy and ought not to be enforced":—

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Held, that the plaintiff was not entitled to particulars of this allegation.

The contrary practice indicated in a note to R. S. C., O. XIX., r. 22, in the Yearly Practice, 1940 ed., p. 333, and by a form in Chitty's King's Bench Forms, 16th ed., p. 254, is wrong and ought to be discontinued.

APPEAL from Cassels J.

The plaintiff, Granville Burgess, claimed commission on government contracts obtained by him for the defendants, Beethoven Electric Equipment, Ltd., in accordance with the terms of an agreement contained in letters passing between him and the defendants in July and August, 1940. In their defence the defendants pleaded (inter alia): "Further and alternatively the alleged agreement was intended by the plaintiff to be carried out by the offer by him of bribes, reward or other inducement to government officials to induce favour to be shown to the defendants, and the said agreement was illegal and void or is voidable, and is against public policy and ought not to be enforced." The plaintiff, relying on a note to R. S. C., O. XIX., r. 22 (1), in the Yearly Practice, 1940 ed., p. 333, and on the form in Chitty's King's Bench Forms, 16th ed., p. 254, asked for particulars of any evidence of any specific fact or facts, document or documents, or overt act or acts of the plaintiff on which the defendants intended to rely in support of this allegation. Master Baker refused to order particulars, and his order was affirmed by Cassels J. The plaintiff appealed.

Gallop for the plaintiff.

Stenham for the defendants was not called on to argue.

The plaintiff's argument is sufficiently indicated in the judgment.

LORD GREENE M.R. The ground of the refusal of the plaintiff's application for particulars was that under O. XIX.,

(1) The rules and note referred to are set out in full in the judgment.

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r. 22, no such particulars could be obtained. That rule is in the following terms: "Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred." I should have thought that that meant what it said, namely, that a pleading which merely makes an allegation of a condition of the mind is sufficient, but it appears that there has been a school of thought which has taken a different view. In the notes to O. XIX., r. 22, contained in the Yearly Practice, 1940, p. 333, this paragraph appears: "This rule deals with pleading. It does not follow, however, that if knowledge is alleged in the pleading *particulars* cannot or will not be ordered If it is alleged that a party 'knew,' or 'well knew,' a certain fact, particulars of any specific fact or document relied on in the form given in Chitty's Forms, 16th ed., p. 254, No. 16, may be, and often are ordered. That form was approved of by Channell J. and the Court of Appeal." The form referred to is for all relevant purposes that used in the present application. The decision mentioned in the note is not reported and is not otherwise available.

In my opinion, there is no justification for that view of the meaning of the rule. As I have said, on the face of it r. 22 appears clearly and without qualification to provide that a pleader who alleges the particular condition of the mind in question has pleaded sufficiently. That view would seem to be strongly confirmed by the language of r. 23, which says: "Wherever it is material to allege notice to any person of any fact, matter, or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, be material." The first part of that rule is in precisely the same form as r. 22, but it contains a qualification, namely, that where the precise terms of the notice are material they must be stated. If they are not stated, particulars can be ordered so as to make the pleading sufficient. The mere fact that in r. 22 no such words appear seems to me to put it beyond doubt that no qualification of that kind is admissible in applying r. 22. Mr. Gallop admitted that his construction of r. 22 involved writing into it a qualification of the same character as, but even more extensive than, the express qualification in r. 23. That seems

to me a violent method of construction for which no justification can be found. He also said that this rule has nothing to do with particulars, but merely sets out what shall be a sufficient allegation that a complete cause of action may be shown. It seems to me that where, to allege a complete cause of action, it is necessary to allege malice, fraudulent intent, knowledge or other condition of the mind, it would not require a rule to say that the cause of action will be adequately stated, from the point of view of its not being demurrable, merely by alleging what everyone would know must be alleged, but Mr. Gallop proceeded from that proposition to consider the language of other rules in the order, and, in particular, r. 7. That rule provides that "A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice or written proceeding requiring particulars, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just." Mr. Gallop contended that r. 22 must be read subject to r. 7, and that r. 22 does not exclude the jurisdiction of the court to order particulars of the conditions of mind referred to in the rule.

It is to be observed that under O. XIX., r. 4, which is the general rule laying down the requisites of a sufficient pleading, every pleading is to "contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved." In a case where malice, or some other condition of the mind, forms an ingredient in the cause of action, the material fact is the existence of that condition of mind, and to proceed to allege circumstances from which the existence of that condition of mind is to be inferred appears to me to be pleading evidence. Mr. Gallop said that r. 4 is concerned only with the sufficiency of an allegation from the point of view of its not being demurrable quite apart from the question of its particularity and that a pleading which may be perfectly good under r. 4 may nevertheless require and call for an order for particulars under r. 7. In *Bruce v. Odhams Press, Ltd.* (1), Greer L.J. said: "It is not sufficient under the existing rules of practice merely to allege in general terms a cause of action. Such cause of action must be alleged with particularity." Accordingly, a pleading which may, from the point of view of

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demurrability, in the strict sense be sufficient, is not a sufficient pleading under the rules if it is defective from the point of view of particularity. Therefore, it is not right to say that r. 4 is not concerned with particulars. It is concerned with particulars, because, if the material facts are pleaded with insufficient particularity, the direction in the rule that the material facts shall be set out has not been complied with. Rule 22 says that it shall be sufficient to allege the condition of the mind as a fact. Can that possibly have any other meaning than that a pleading in which a condition of the mind is alleged as a relevant and material fact will be sufficient without setting out the circumstances from which the same is to be inferred? If it is a sufficient pleading, it is a sufficient pleading for the purposes of r. 4, and a pleading which is a sufficient pleading for the purposes of r. 4 is a pleading in respect of which particulars are not required. The power to order particulars under r. 7 is merely given in order to obtain sufficient particularity in a pleading which is not sufficiently particular as it stands, without having to apply to strike that pleading out. The simpler, more expeditious and cheaper course of applying for particulars is provided.

Rule 22 seems to me to lay down as clearly as anything can be laid down that a pleading which alleges a condition of the mind as a fact is a sufficient pleading, and, therefore, is one in respect of which particulars cannot be ordered. A person who pleads a condition of the mind as a fact has complied with all the rules as regards that matter and cannot be compelled to give further particulars. The result is that this appeal fails. The practice of ordering any type of particulars, whether on the lines of the forms in Chitty's King's Bench Forms or otherwise with regard to matters dealt with by this rule is wrong and ought not to be continued.

MACKINNON L.J. I agree.

DU PARCQ L.J. I agree.

Appeal dismissed.

Solicitors for plaintiff : *Capel Cure, Glynn Barton & Co.*
Solicitors for defendants : *Field, Roscoe & Co.*

J. W. H.

BISHOP OF GLOUCESTER *v.* CUNNINGTON.

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Ecclesiastical law—Parsonage house—Rent restriction—Applicability of Rent and Mortgage Interest Restrictions Acts, 1920 to 1939.

Nov. 23;
Dec. 11.

A house of residence belonging to an ecclesiastical benefice is not a dwelling-house to which the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, apply.

APPEAL from Cheltenham county court.

By a lease dated October 9, 1939, the lessor, who was then incumbent of the living of Charlton Kings, in the diocese of Gloucester, and had obtained a licence to reside outside the benefice, demised the parsonage house, which had a rateable value of 48*l.*, to the defendant for the duration of the war and one month thereafter. The lease contained a proviso that it should terminate and be void in the event of the lessor ceasing to be the incumbent of the living. In March, 1942, the incumbent resigned the living, and, by a deed dated March 5, 1942, he surrendered the parsonage house to the bishop of the diocese. The bishop desired to obtain possession of the house, so that the new incumbent might reside there, but the defendant alleged that he was unable to secure alternative accommodation. In an action for possession brought by the bishop in the county court the county court judge held that the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, applied and he, therefore, dismissed the action. The bishop appealed.

Denning K.C. and *Diplock* for the bishop. The general words of the Rent Restrictions Acts might be considered wide enough to cover a parsonage house, but the legislature, when passing the Acts, could not have had such dwellings in mind, and the Acts cannot be intended to apply to them. An enactment or enactments directed towards a special object or special class of objects will not be repealed by a subsequent general Act embracing in its generality those particular objects unless some reference be made directly or by necessary reference to the preceding special enactment or enactments: *Garnett v. Bradley* (1); *Blackpool Corporation v. Starr Estate Co.* (2); *Rex v. Minister of Health* (3). *Generalia specialibus non*

(1) (1878) 3 A. C. 944, 950, 967. (3) [1936] 2 K. B. 29, 44.

(2) [1922] 1 A. C. 27, 34.

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derogant. Where the general words in a later Act are capable of reasonable application without their being extended to subjects specially dealt with by earlier legislation, that earlier legislation must not be considered to be affected by the later Act: *Seward v. "Vera Cruz"* (1). It has been held from early times that the incumbent must reside in the benefice: *Butler and Goodale's Case* (2); *Wilkinson v. Allot* (3); Burn's Ecclesiastical Law, 9th ed., vol. iii., pp. 477-478; Coke's Institutes, Part II., p. 625. The special statutory provisions with regard to the subject are contained in the Pluralities Act, 1838, the material sections of which are ss. 32, 33, 36, 43, 44, 46, 54 and 59. None of these special provisions is affected by the general words of the Rent Restrictions Acts. A particular instance is afforded by s. 59 of the Pluralities Act, 1838, which deals with the conditions under which a lease of a parsonage house can be granted and provides for the avoidance of the lease on an order by the bishop requiring the incumbent to reside there: see *Rickard v. Graham* (4). That section must be impliedly repealed by the Rent Restrictions Acts if they apply to a parsonage house, but there is nothing to show that such a repeal was contemplated.

R. C. Hutton for the defendant. There is nothing from which it can be inferred that the legislature meant to exclude ecclesiastical residences from the scope of the Rent Restrictions Acts. Even if such residences were excluded, only houses coming under the authority of the Church of England would be excluded, although it might be equally important for a Roman Catholic priest or a Nonconformist clergyman to reside near his flock. It cannot be maintained that the legislature, when passing the Rent Restrictions Acts, had not in mind the law dealing with parsonage houses, nor can it be inferred that the legislature relied on matters other than the Rent Restrictions Acts to prevent the rents of parsonage houses being raised in a time of emergency. The material sections of the Pluralities Act, 1838, do not support the view that the Rent Restrictions Acts were not intended to apply to parsonage houses.

At the conclusion of the argument, the court (LORD GREENE M.R., SCOTT and MACKINNON L.JJ.) announced that they would allow the appeal, but would give their reasons later in writing.

1942. Dec. II. LORD GREENE M.R. read the following

(1) (1884) 10 A. C. 59, 68.

(2) (1598) 6 Co. Rep. 21b.

(3) (1776) 2 Cowp. 429.

(4) [1910] 1 Ch. 722.

judgment of the court. This appeal raises the important question whether a house of residence belonging to an ecclesiastical benefice is affected by the Rent Restrictions Acts. It is not disputed that there is no express provision in the Rent Restrictions Acts which excludes a parsonage house from their operation. Such a house is clearly a dwelling-house, and, as such, it falls within the actual language of the Acts. The only question which arises is whether the Acts are to be construed as being by implication inapplicable to a parsonage house on the principle *generalia specialibus non derogant*. This principle has been expressed in various ways, not differing in substance, in a number of authorities. It is sufficient for present purposes to quote the language of the Earl of Selborne L.C., in *Seward v. "Vera Cruz"* (1): "Now 'if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so.'" It is necessary, therefore, to consider briefly the legislation affecting parsonage houses.

The ancient rule, both of the canon law (see Burn's Ecclesiastical Law, 9th ed., vol. iii., pp. 477-478) and of the common law (*ibid.* p. 478, and see Coke's Institutes, Part II., p. 625), that a person having the cure of souls must reside on his cure, was given statutory force by the Act 21 Henry 8, c. 13, under which it was held, probably in accordance with the meaning of the ancient rule, that "the parson ought to abide on his rectory, namely, the parsonage-house, and not in another house, although it be within the same parish; for the statute intended, not only for serving the cure, and for hospitality, but also for the maintaining of the house and habitation of the parson, not only for himself but also for his successors, that they also may keep hospitality there." *Butler and Goodale's Case* (2). I need not refer to any other legislation on the subject previous to the Pluralities Act, 1838, which is now in force and contains the relevant statutory provisions with regard to parsonage houses. Those provisions are as follows. Sect. 32 provides that "every spiritual person holding any benefice shall keep residence on his

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(1) 10 App. Cas. 59, 68.

(2) 6 Co. Rep. 21b.

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"benefice, and in the house of residence (if any) belonging "thereto," and it inflicts penalties on anyone who fails to do so without a licence. Under s. 33, the bishop of the diocese may grant a licence to reside in some other fit and convenient house in cases where there is "no house or no fit house of "residence" belonging to the benefice. Under s. 36, the widow of a deceased incumbent is given the right to remain in occupation of the parsonage house for a period not exceeding two calendar months after his decease. Under s. 43, the bishop may grant a licence to the incumbent to reside out of the parsonage house in certain special cases, including the case where there is no house or no fit house of residence in the benefice and the special case where the incumbent has a house of his own in the same parish. Sect. 46 provides that no licence for non-residence (which apparently includes a licence to reside out of the parsonage house) is to continue in force after December 31 in the year next after that in which it is granted. Sect. 59 has for present purposes a special importance. It provides that any agreement for letting a parsonage house to which an incumbent may be ordered by the bishop (under s. 54) to proceed and reside therein, is to contain a condition for avoiding the same upon a copy of the order being served upon the occupier, or left at the house, and otherwise shall be null and void. An occupier who fails to give up the house when served with a copy of the order is made liable to a penalty of 40s. a day, and the incumbent may apply to a justice of the peace for a warrant for the taking of possession of the house. It is to be noted that the lease granted to the defendant in the present case did not contain the condition of avoidance required by the section, but this omission only had the effect of making the lease voidable. It would only have become void if and when the bishop had ordered personal residence by the incumbent: *Rickard v. Graham* (1).

This review of the relevant statutory provisions which were in force when the Rent Restrictions Acts were passed shows that parsonage houses are placed by the legislature in a category by themselves. Save where a licence is obtained, residence by the incumbent in a parsonage house is compulsory. An incumbent who fails to reside in the house can be ordered to do so, and an occupier can be expelled to make room for him. The reasons for this special treatment are of a spiritual

nature, and are based on the necessity for ensuring that the cure of souls shall be conducted by an incumbent residing, not only in the benefice, but in the parsonage house itself which is provided to enable him to perform his spiritual duties and (what is important) the duties of hospitality connected therewith. These considerations make it, in our view, impossible to suppose that the legislature intended that where a parsonage house has been let the tenant should have the protection of the Rent Restrictions Acts. Particular confirmation of this view is to be found by a consideration of s. 59, of the Pluralities Act, 1838. Under that section, as has been already pointed out, every lease of a parsonage house can be avoided and the tenant evicted whenever the bishop orders the incumbent to reside in the house. If the Rent Restrictions Acts apply to such a house they must impliedly have repealed the provisions of that section under which possession can be obtained to enable the incumbent to reside. It is, in our view, impossible to think that any such implied repeal could have been intended. The appeal is allowed.

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Appeal allowed.

Solicitors for the bishop: *Armitage, Chapple & Co., for Madge, Lloyd & Gibson, Gloucester.*

Solicitors for defendant: *Smiles & Co., for Steel, Lane & Yeend, Cheltenham.*

KNIGHT v. GREAT WESTERN RAILWAY COMPANY.

1942
June 24.

Railway—Negligence—Branch line—Private level accommodation crossing—Fog—Duty of engine driver—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 68.

There is a duty on a railway company, to take reasonable precautions with regard to the approach of their trains to a private level accommodation crossing over a branch line of their railway, but the nature of the precautions and the degree of care required are not the same as those required where a railway line is crossed by a way over which the public have a right to pass. The mere fact that the driver of an engine approaches a private

Reported by C. G. Moran, Esq., Barrister-at-Law.

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level accommodation crossing, of which he has knowledge, in fog or mist at such a speed that he is unable to pull up within the limits of his vision is not evidence of negligence.

ACTION tried by Tucker J., without a jury.

The plaintiff, Jasper Webb Knight, was the owner of a farm which extended on both sides of the defendants' branch line of railway from Twyford to Henley. Connecting the portions of the plaintiff's farm on each side of the railway lines was a private level accommodation crossing which the plaintiff was entitled to use for passage for any purpose. On June 7, 1941, at 7.20 A.M., a light engine and tender of the defendants, proceeding on the down line from Twyford to Henley, ran into a herd of cows belonging to the plaintiff which were being driven over the crossing by two servants of the plaintiff, killing seven cows and injuring another so that it had to be destroyed. The plaintiff brought this action claiming damages for the loss of his cows by the negligence of the defendants, alleging (*inter alia*) that the driver of the engine had driven at an excessive speed and had failed to blow his whistle at the whistle board, situated some four hundred and forty yards from the crossing. On this last point, however, Tucker J. found that the driver had sounded his whistle. The defendants denied negligence and pleaded contributory negligence on the part of the plaintiff's servants. From the evidence it appeared that owing to fog, visibility at the crossing was limited to a space of from thirty to fifty yards, and that the engine was proceeding at thirty miles an hour at the time of the accident. The driver knew of the existence of the crossing and that cows were driven across it daily, but the signals indicated that the line, from the railway point of view, was clear. It took about three minutes from first to last for the plaintiff's two servants to drive the herd over the crossing. It was agreed between counsel that there is nothing in any conveyance with regard to the plaintiff's farm which affected the rights and liabilities of the parties. The plaintiff's right to use the crossing and the defendants' liabilities with regard to it arose out of s. 68 of the Railways Clauses Consolidation Act, 1845 (1), and it was agreed that,

(1) By Railway Clauses Consolidation Act, 1845, s. 68: "The company shall make and at all times thereafter maintain the following works for the accommo-

"dation of the owners and
"occupiers of lands adjoining the
"railway; (that is to say,) such
"and so many convenient gates,
"bridges, arches, culverts and

as a necessary consequence of the provisions of that section, the plaintiff had a right of way over the company's railway lines at the crossing.

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P. M. O'Connor for the plaintiff. The driver did not exercise the degree of care which is required by the driver of an engine when approaching a private level crossing, of which he has knowledge, in fog or mist. In *Cliff v. Midland Ry. Co.* Mellor J. said (1): "In crossing a footway on a level the company are bound as to the mode of working their railway, as to the rate of speed, and signalling or whistling, or other ordinary precautions in the working of a railway, to do everything which is reasonably necessary to secure the safety of persons who have to cross the railway by means of the footway." In *Ellis v. Great Western Ry. Co.* (2) Cockburn C.J. approved that statement of the law. The only way in which the defendants' driver could secure the safety of persons or beasts using this crossing in fog or mist would be by proceeding at such a speed that he was able to pull up within the limits of his vision. [*Rex v. Broad* (3) was also cited.]

Cartwright Sharp K.C. and *R. C. Hutton* for the defendants. The defendants do not owe to those using a private level accommodation crossing the duty of care which they owe to members of the public using a public crossing: see judgment of Scrutton L.J. in *Burrows v. Southern Ry. Co.* (4). On the contrary, "where the legislature authorizes a railway to cross a way, public or private, upon a level, and does not require from the company any precaution to avoid danger, the legislature intends that the persons who have to cross that line should take the risk incident to that state of things": per Lush J. in *Cliff v. Midland Ry. Co.* (5). But he added that if the railway company in the construction of the works do anything which prevents persons passing over the line from taking care of themselves and exposes them to greater danger

"passages over, under, or by the sides of or leading to or from the railway as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made; and such works shall be made forthwith after the part

"of the railway passing over such lands shall have been laid out or formed or during the formation thereof."

(1) (1870) L. R. 5 Q. B. 261.

(2) (1874) L. R. 9 C. P. 555.

(3) [1915] A. C. 1110.

(4) Unrep., Nov. 8, 1933.

(5) L. R. 5 Q. B. 264.

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than is ordinarily incident to a level crossing, then the company impose on themselves an obligation to take other than the usual precautions. There is no authority for applying in such a case as the present the rule applicable to a driver on the highway that he should proceed at such a speed that he is able to stop within the limits of his vision. To apply that rule to branch railway lines where there are private level accommodation crossings would, in this country of fog and mist, bring railway traffic to a standstill.

O'Connor replied.

TUCKER J. The question what is the duty or the degree of care which is required from a railway company in respect of a crossing of this kind is by no means free from difficulty.

I have been referred to the transcript of a shorthand note of the judgment of Scrutton L.J. in *Burrows v. Southern Ry. Co.* (1). The actual decision in that case does not assist me, but in the course of his judgment Scrutton L.J. made some observations with regard to such crossings as this. He said: "The first question, therefore, in our view, and the "only question we are going to decide, is this: Was there "evidence upon which the jury could find that the railway "company had not taken reasonable precautions to prevent "danger at this crossing? Now I should be very reluctant "to lay down a rule that at any private crossing the railway "company is bound to use special precautions of some kind. "I can quite conceive of cases where owing to a sharp turn "in the railway, or the presence of large numbers of trees in "a cutting obstructing the view, a jury may find 'We think "'some reasonable precautions should be taken even at a "'private crossing.' But I ask myself, and I have considered "the evidence very carefully, whether at this crossing as we "see it, and on the facts we know, there was anything to "distinguish it from any other private crossing where the "railway company has for some reasons granted rights to "particular people in the locality, but not to the whole public, "because obviously there are great differences between cases "where any member of the public, not having seen the crossing "before, may come to a crossing and cases where the crossing "is only used by people who are always using it, because "they are in the locality and using it for the purposes of their "business." It is true that the learned lord justice was

(1) Unrep., Nov. 8, 1933.

directing his observations more to the provision of men at the crossing to give warning of approach, or to the position of warning signals such as a whistle board, and matters of that kind. He was dealing more with what I may call the general layout of the locus in quo than with the conduct of the engine driver. Another case referred to was *Cliff v. Midland Ry. Co.* (1) where "there was an occupation road "for carriage and foot passengers crossing the defendants' "line of railway on a level, and leading from a highway called "Mantel Lane to the Snibstone colliery." In dealing with the nature of the duty on a railway company in such circumstances, Mellor J. used these words (2): "I quite agree "with the learned counsel for the plaintiff to this extent, "that when Parliament authorizes a company to construct a "railway and to work it, it is implied in that that the company "are to work it in a reasonably proper manner, in the usual "way in which railways are worked ; and in crossing a footway "on a level the company are bound, as to the mode of working "their railway, as to the rate of speed, and signalling or "whistling, or other ordinary precautions in the working of "a railway, to do everything which is reasonably necessary "to secure the safety of persons who have to cross the railway "by means of the footway." Those words were quoted with approval by Cockburn C.J., in *Ellis v. Great Western Ry. Co.* (3) which dealt with a public crossing.

In my opinion, there is a duty cast on a railway company to take reasonable precautions in regard to the approach of their trains to such a crossing as that with which we are concerned in the present case. I am satisfied, however, that the nature of the precautions and the degree of care which is required may vary very considerably according to whether the crossing which is being approached is one over which the public have a right to go or whether it is merely a private accommodation crossing for the use of the adjoining occupier. The difference is merely in the degree of care which is required in the circumstances. I do not accept the contention that the defendants' only obligation is to refrain from doing something which would in effect amount to obstructing the plaintiff's right of way across this crossing. I think that the duty of the railway company is greater than that. In the present case the only question is whether it is negligent for

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(1) L. R. 5 Q. B. 259.

(3) L. R. 9 C. P. 555.

(2) Ibid. 261.

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the driver of an engine, travelling in a fog along a line of this nature where he knows he will be crossing a private accommodation crossing, to drive at such a speed that he is unable to pull up within the limits of his field of vision? I have come to the conclusion, on the whole, that it would be imposing too high a degree of care on the driver to answer that question in the affirmative. I do not think that it would be right to apply the same kind of tests in respect to speed in conditions of fog, as one would apply to the driver of a vehicle on a highway, and, therefore, I hold that the plaintiff has not established that the defendants were guilty of negligence merely because the engine driver was driving at thirty miles an hour. Apart from the question of speed, I am satisfied that there was no negligence on the part of the driver. None of my observations, of course, have any bearing on a failure to observe signals or anything of that kind. Other considerations would apply there, but in this case the driver had received the appropriate fog signal, that the line was clear from the railway point of view.

The fact is that the plaintiff's servants in driving this considerable herd of cows over the crossing were engaged in an extremely hazardous operation which took three minutes to complete. In my view, even had the defendants' driver been guilty of any failure to take care amounting to negligence, the plaintiff's servants would have been equally guilty of a failure to take reasonable care so that the accident would have been due equally to the negligence of the plaintiff's and the defendants' servants, and this is not a case where I could say that the doctrine of the last opportunity applies. However that may be, I base my decision primarily on the finding that the plaintiff has not shown that the defendants' driver was guilty of negligence in approaching this crossing in the circumstances at thirty miles an hour, and, therefore, there must be judgment for the defendants with costs.

Judgment for defendants.

Solicitors for plaintiff: *Frederick Pope & Co.*

Solicitor for defendants: *P. W. Pine.*

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Emergency legislation—Control of employment—Essential work—Direction of Minister—Failure of workman to obey—Reasonableness of refusal—Consideration by justices—Defence (General) Regulations, 1939 (St. R. & O., 1939, No. 927), reg. 58A.

On an information against a workman for failure to perform essential work in compliance with a direction given on behalf of the Minister of Labour and National Service under reg. 58A of the Defence (General) Regulations, 1939, the giving of the direction and the failure to comply with it were proved, and the capability of the workman to perform the work was admitted:—

Held, that the justices were not entitled to inquire into the reasonableness of the direction, but were bound to convict the workman of an offence under reg. 92 of the regulations.

CASE stated by Glamorgan justices.

At a court of summary jurisdiction sitting at Abercynon, Glamorgan, an information was preferred by the appellant, George Eric Horton, on behalf of the Minister of Labour and National Service, against the respondent, Thomas George Owen, for that he on October 6, 1941, did unlawfully fail to comply with a direction under reg. 58A of the Defence (General) Regulations, 1939 (1), given to him by a national service officer on behalf of the Minister, to perform work as a fitter with a firm at Cwmbran, Monmouthshire.

The respondent, a married man, aged 41 years, who resided at Abercynon with his wife and child, had been trained and employed as a fitter at a government training centre. On October 3, 1941, he was directed by a national service officer, on behalf of the Minister, to perform work as a fitter with Joseph Lucas, Ltd., at Grange Works, Cwmbran. The respondent had for some years suffered from attacks of asthma and bronchitis during the night. He admitted that the work specified in the direction was such as he was capable of performing, but he refused to comply with the direction on the grounds of health and the lack of travelling facilities to enable him to journey daily between his home and Cwmbran, thus

(1) Defence (General) Regulations, 1939, reg. 58A:—"The Minister of Labour and National Service may direct any person . . . in the United Kingdom to perform such services in the

" United Kingdom . . . as may
" be specified by the direction,
" being services which that person
" is, in the opinion of the Minister,
" capable of performing."

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necessitating his living in lodgings where the nursing attention which he needed would be unobtainable. The justices held that they were entitled to consider whether the respondent was reasonably justified in refusing to perform the direction of the Minister, and they came to the following conclusions: (1.) That the respondent was capable of doing the work referred to in the direction, although he suffered from asthma; (2.) that they were not satisfied that any facilities existed to enable the respondent to travel daily between Abercynon and Cwmbran; (3.) and that, in view of the periodic nightly attacks of asthma and coughing from which he suffered and the lack of nursing attention if he lodged at Cwmbran, he had not acted unreasonably in refusing to comply with the direction. They, therefore, dismissed the information. The appellant appealed.

Sir D. Maxwell Fyfe S.-G. and *Arthian Davies* for the appellant. Regulation 58A involves three conditions:— (1.) the giving of a direction to a person within the regulation, (2.) the specifying of the services, and (3.) the services being such as, in the opinion of the Minister, the person directed is capable of performing. Those conditions being satisfied and the person directed failing to comply with the direction, the justices have no other course open to them than to convict under reg. 92 of the Defence Regulations (1). They have no jurisdiction to consider the reasonableness of the direction. That is purely a matter for the Minister. *Minister of Agriculture and Fisheries v. Price* (2) was an analogous case. There is no distinction to be drawn for present purposes between reg. 62, which was considered there, and reg. 58A. If anything, the words of reg. 58A are more definite.

The respondent was not represented.

VISCOUNT CALDECOTE C.J. It is contended on behalf of the appellant that it was not open to the justices to find that, in view of the periodic nightly attacks of asthma from which the respondent suffered and the lack of nursing attention if

(1) Defence (General) Regulations, 1939, reg. 92:—"If any person contravenes or fails to comply with any of these regulations . . . or any direction given or requirement imposed under any of these regulations

" . . . he shall, save as otherwise expressly provided by or under that regulation, be guilty of an offence against that regulation."

(2) [1941] 2 K. B. 116.

he lodged at Cwmbran, he had not acted unreasonably in refusing to comply with the direction given to him by the appellant. It is said that all the justices had power to do was to consider whether a direction specifying the services to be performed had been given to the respondent by the Minister in good faith and whether the respondent had failed to comply with that direction. The court has been referred to *Minister of Agriculture and Fisheries v. Price* (1), where a somewhat similar question arose. The justices had found that no offence had been committed because they considered that the direction to cultivate land which had there been given was unreasonable, but this court held that the justices had no concern with the reasonableness or otherwise of the direction, and could only consider whether the direction had been properly given and whether the person directed had failed to comply with it. I have come to the conclusion that our decision in the present case must be to the same effect. There is no question here about the capability of the respondent to perform the specified work. The only point raised by him was that it was a hardship for him to be obliged to comply with the direction of the Minister. I am not inclined to say anything about the hardship of the case because I do not know sufficient of the circumstances. In view of the fact that a direction specifying the services to be performed was duly given to the respondent and that admittedly he was capable of performing the work, there seems to me to be only one conclusion possible, namely, that the respondent committed an offence under reg. 92 by failing to comply with the direction. The case should be remitted to the justices as it was in *Minister of Agriculture and Fisheries v. Price* (1), with an intimation that, in the opinion of this court, an offence has been proved. It is possible that they may think that this is a case in which they can take a course which will not require a conviction.

TUCKER J. This is a case of considerable importance because it involves interference with the freedom of action and choice of the subject. In my view, there was only one course open to the justices, and that was to find that an offence had been committed. They were not concerned with whether or not there were any mitigating circumstances. The only question was whether the findings at which they had arrived indicated the commission of an offence within the

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meaning of the regulations. It is clear that they did. There is nothing in reg. 92 providing that, before a person is convicted, it must be proved that he unreasonably failed to comply with a regulation, direction, or requirement. The regulation merely states that, if he does in fact fail so to comply, he is guilty of an offence. I agree that the case should be remitted to the justices.

I do not want to be thought to be taking too narrow a view of the facts stated in this case, or of the meaning of the word "capable" in reg. 58A. Speaking for myself, I do not think that "capable" in the regulation is confined to a person's capability of doing any particular work purely from a physical point of view. I think that it must involve the consideration of the locality of the work where the person is required to perform the services, coupled with a consideration of the person's physical, or, perhaps, mental, capacity to perform that work in that particular place. It is not, however, necessary for the decision of this case to express any final opinion on that matter, nor, in my view, is it necessary to decide whether or not the Minister is to be the final judge with regard to the person's capability at the time of the making of the order or whether somebody else can inquire into it. In this case there is no finding in any way impugning the propriety of the direction.

CASSELS J. I agree.

Case remitted.

Solicitor for appellant : *Solicitor to Ministry of Labour.*

A. W. G.

*Distinguished. HALL v.
 BECKENHAM CORPN.
 [1949] 1 K. B. 716*

*Distinguished. HALL v. BECKENHAM
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 28 ;
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NORTH RIDING OF YORKSHIRE COUNTY VALUATION
 COMMITTEE v. REDCAR CORPORATION AND ANOTHER.

Rates—Local authority—Beneficial occupation—Land used for public benefit—Swimming baths, boating lake, pavilion or concert hall, accommodation for games—Lock-up shops—Substantial revenue derived from properties.

A local authority, acting under s. 164 of the Public Health Act, 1875, purchased by agreement the foreshore and certain lands which were formerly sand dunes to be used as public walks and pleasure grounds. On the lands they constructed swimming

baths, bathing pools, a boating lake, a putting golf course, a car-park, and a pavilion or concert hall, to which places the public were admitted on payment of an admission fee, and two lock-up shops which were let. On the foreshore the corporation let for the summer season sites for roundabouts, swings, kiosks, stalls, donkeys and other forms of diversions, and constructed three putting golf courses. The public had free access to the foreshore, but there was no dedication of the land or foreshore to the public. In one year the authority received a total income of 11,512*l.* from the hereditaments and spent 11,034*l.* in respect of them :—

Held, that, for rating purposes, the authority were in occupation of the hereditaments in question which were not merely ancillary to the use by the public of the walks and pleasure grounds in which they were situated.

Lambeth Overseers v. London County Council [1897] A. C. 625 ; and *Liverpool Corporation v. West Derby Assessment Committee* [1908] 2 K. B. 647 distinguished.

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SPECIAL case stated under s. 11 of the Quarter Sessions Act, 1849.

The appellants were the county valuation committee of the North Riding of Yorkshire. The respondents, Redcar Corporation, were the owners of the hereditaments hereinafter set out, all of which were situate in the Guisborough assessment area of which the respondents, the Guisborough Assessment Committee, were the assessment committee. From the dates when the corporation acquired the hereditaments (all of which were situate in the borough of Redcar) the hereditaments had been assessed in the valuation list, and the corporation had paid the rates in respect of them, but on March 30, 1938, the corporation made a proposal for the amendment of the list on the ground that "The town council is not in occupation of these hereditaments for rating purposes." The appellants gave notice in writing of their objection to the proposal. The proposal and the objection were heard by the Guisborough assessment committee on March 12, 1941, when the proposal was accepted and the assessment committee determined that the assessments should be deleted from the valuation list. On March 24, 1941, the appellants gave notice of their intention to appeal against that decision to the court of quarter sessions for the North Riding of Yorkshire and the corporation and the assessment committee gave notice of their intention to appear jointly as respondents. It was thereupon agreed between the appellants and the respondents that the facts of the case should be stated in the form of a special case for the opinion of the High Court.

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The facts, as stated, were as follows. Redcar Corporation were the owners in fee simple of the foreshore and certain lands adjoining or abutting thereon at Redcar. The total area of the whole of the lands comprised in the conveyances hereinafter mentioned was approximately 381·825 acres. All the lands were purchased by agreement between 1923 and 1933, and all the buildings and works erected or executed by the first respondents on the lands were erected or executed, under the powers conferred by s. 164 of the Public Health Act, 1875, and Part VI. of the Public Health Acts Amendment Act, 1909. The loans raised by the corporation for the purchase of the lands and for the erection and execution of all such buildings were sanctioned by the Minister of Health "for the purposes of public walks and pleasure grounds." Included in the valuation list in force up to the decision of the Guisborough assessment committee on the corporation's proposal were seven separate hereditaments forming part of the property. A copy of the material part of the valuation list is set out hereunder :

No.	Asst. No.	Nature of valuation list at date of proposal of		Description.	Situation.	Values	
		(a) Occupier.	(b) Owner.			Gross.	Ra ab
1	7685	Redcar Corporation.	Redcar Corporation.	Swimming baths, etc.	Coatham ..	£ 288	23
2	7686	do.	do.	Open-air swimming pool.	do.	124	10
3	7687	do.	do.	Boating lake, etc.	do.	150	12
4	5953	do.	do.	New pavilion	Newcom- mon Terr.	170	13
5	5954	Walker's Libraries, Ltd.	do.	Lock-up shop	do.	27	2
6	5955	do.	do.	do.	do.	27	2
7	9891	Redcar Corporation.	do.	Foreshore ..	Redcar ..	—	34

The hereditaments numbered 1 to 3 were situated within a fenced area of land known as the Coatham enclosure. No assessment for rating was made on that enclosure or any part of it other than the said hereditaments. The enclosure was

7.05 acres in extent and was situated at the westward end of the promenade. The land was originally sand dunes, and it had been levelled, turfed, and laid out with footpaths, rockeries, and flower beds. To Coatham enclosure itself the public had free access at all hours of the day and night, but entrance to two of the three properties mentioned, namely (1.) swimming baths, and (2.) open air swimming pool was obtained only on payment of a fee. The whole enclosure was surrounded by an iron fence, and there were three entrances which might be, but in fact never were, closed. In 1930 Redcar Corporation constructed inside the Coatham enclosure (i.) public indoor seawater swimming baths; (ii.) open-air bathing pool; (iii.) juvenile swimming pool; (iv.) boating lake; (v.) putting green; (vi.) public conveniences with the necessary appurtenances; (vii.) a car park was also constructed at the south-west corner of the enclosure, access to it being obtained by a carriageway along and within the south boundary of the enclosure from the entrance at the south-east corner of the enclosure.

Each of the properties (i.) to (vii.) inclusive might be described individually as follows: (i.) Public indoor seawater swimming baths (hereditament No. 1 in the valuation list). This was a brick building with slate roof covering an area of .2595 acres. It comprised a tiled swimming bath, 100 by 30 feet in size, with the necessary heating, aerating and sterilising plant; 112 dressing cubicles arranged in passages along the north and south sides of the bath, with showers, footbaths and conveniences; and a gallery with seating accommodation for 600 persons over the cubicles. A refreshment room, which was also available for users of the open-air swimming pool, was situate at the east end of the building. Admission to the building was only obtained by a turnstile at the east end of the building. A charge of sixpence for admission was made for each person, whether as swimmer or spectator, except in the case of a holder of a receipt for the fee payable in respect of the car park, who was admitted free. (ii.) Open-air bathing pool (hereditament No. 2 in the valuation list). The pool, which adjoined the swimming baths, was of concrete construction and covered an area of .8808 acres. It was of a maximum length of 140 feet and a maximum width of 132 feet. At the north end were 74 dressing cubicles arranged in corridors with showers, footbaths and conveniences. Around the pool was seating accommodation for 1250 spectators

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and accommodation for sun bathing. Admission to the pool was obtained either by way of an entrance at the east side of the pool or through the turnstile between the pool and the swimming baths. The same charge for admission was made as in the case of the swimming baths. (iii.) Open-air juvenile swimming pool. This property was now disused and virtually derelict, and no assessment in respect of it appeared in the valuation list. (iv.) Boating lake (hereditament No. 3 in the valuation list). This was of concrete construction and throughout the greater part of its circumference was bounded by a public walk. Redcar Corporation provided during the summer months boats on this lake which might be hired by members of the public on payment of the authorized fee. The boats were housed in a boathouse which adjoined the lake and an attendant employed by the corporation supervised the loading and unloading of these boats and collected the tickets authorizing their use. These tickets were obtainable from a pay box situated in the boathouse. After passing through the entrance gate, members of the public handed the tickets to the attendant. (v.) Putting green. This piece of land covering .48 acres was laid out as an 18-hole putting green and was surrounded by a wrought iron fence four feet high on the south and east sides and two feet high on the north and west sides. A notice was exhibited: "Players 'only allowed on the course.'" Entrance to the course was obtained at the north-east corner and a charge of threepence per person per round was made which included the use of a putter and a ball. (vi.) Public conveniences were provided near the main entrance at the north-east corner of the enclosure and comprised the usual private lavatories for use of which one penny was charged. (vii.) Car park. This piece of land, now occupied and used as a car park, had been constructed by Redcar Corporation inside the enclosure. A charge of sixpence was made as a parking fee, and the receipt of a parking ticket entitled the holder to a swim without further payment if he so desired. No separate assessment appeared in the valuation list in respect of the putting green, public conveniences, or car park.

There were also within the enclosure :—(a) A day nursery owned and occupied by a charitable organization which had been given the use of the site free of charge by the corporation. The nursery was open during July and August and a small charge was made for the care of small children. The receipts

were retained by the organization. (b) A tea hut, which was open only during the season and was let for the sale of tea, coffee, cocoa and biscuits. (c) During the season two kiosks were erected and were let for the sale of ice-cream. No separate assessment of the day nursery, tea hut, or kiosks appeared in the valuation list.

The hereditaments numbered 4, 5 and 6 in the valuation list consisted of a building known as the "New Pavilion" and two lock-up shops. The main entrance to each of the three parts abutted on to, and access was gained from, the promenade. (i.) The New Pavilion comprised an auditorium with balcony at the south end providing seating accommodation for 800 persons, a stage, dressing rooms, boiler house, and foyer with ticket and manager's offices. The pavilion was licensed for music and stage plays, the licensee being the entertainments manager of Redcar Corporation who exercised supervision and control over it at all times. In 1937, the corporation employed at the pavilion a stage manager and a caretaker (who were permanent employees) and, during the season (i.e. from June to September)—one cashier, six usherettes, and one programme boy. During the season an agreement was made with a producer to provide variety and concert party entertainments in the pavilion, the corporation paying him a sum representing 60 per centum per week of the gross takings, less entertainments tax, with a minimum of 70*l*. The charges for admission to these entertainments were fixed by the corporation and ranged from fourpence to two shillings. In inclement weather, when there was no entertainment in progress, concerts by a band employed by the corporation were from time to time given in the pavilion for which an admission fee of threepence was charged by the corporation. Except when the pavilion was in use for entertainments or concerts the public were permitted during the season to enter the pavilion to rest during the day time. During the remainder of the year the pavilion was not open to the public, but it might be hired on payment of a fee. Under the standing orders of the council of Redcar Corporation the annual meeting of the council on November 9 was held in the pavilion which was also used by the council for conferences, public meetings, etc. (ii.) The two lock-up shops attached to the New Pavilion were regularly let during the season, and for the season 1937 were let to (a) an ice-cream company and (b) a bookseller. In common with most of the

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shops on the promenade in private ownership these two lock-up shops were open only during the season. Each had a main entrance from the promenade and also a door communicating with the foyer of the New Pavilion. The latter doors were available for the use of customers when the shops and the New Pavilion were open, the door keys being in the possession of the tenants.

The hereditament numbered 7 in the valuation list consisted of the foreshore excepting the hereditaments numbered 1 to 6 in the list but including the golf courses hereinafter described. The golf courses were not separately assessed in the valuation list, but their value was included in the assessment of the foreshore. On part of these lands was a number of roundabouts, swings, kiosks, stalls, donkeys, boats and other properties. The sites for these purposes in respect of the summer season were advertised, and offers for them from prospective licensees were considered by the corporation, who selected the most suitable applicants. On certain sites the corporation provided a kiosk or hut, but on all other sites the licensee had to provide any building he wanted, which must be approved by the corporation. All sites were cleared of buildings or erections at the close of the season. The corporation also provided deck chairs and bathing tents for use on the sand lands and made charges for them. On part of these lands, which consisted of sand dunes, there had been laid out, but not enclosed—(a) two 18-hole putting courses, (b) an 18-hole "clock golf" putting green, and (c) a 9-hole "pitch and putt" golf course. The public had access to the whole of these lands even when play was in progress. Charges were made for the use of the facilities provided for the games. On the promenade there were a number of free shelters, public lavatories (with the usual charges), etc. There was also a bandstand and the corporation engaged bands during the season to play there. With the exception of certain free seats, a charge of 2d. was made for the use of a chair near the bandstand during a band performance. The corporation had made by-laws regulating the seashore and esplanade and the marine promenade under ss. 82 and 83 of the Public Health Acts Amendment Act, 1907.

The only material restrictive covenant in the conveyance of the land surrounding the swimming bath, the open-air swimming pool, the boating lake, and the pavilion was that the

corporation should not erect between a neighbouring convalescent home and the sea any erection or building, and should give public access to walk, fish, bathe, and gather seaweed, and not erect a building without the consent of the Board of Trade. The only material restrictive covenants in the conveyance of the land of the foreshore was that it should be used for the public benefit only, subject to regulations and supervision to ensure orderly use for entertainment, recreation, and amusement, and that it should be preserved as an open space in perpetuity and not used otherwise than as a public recreation ground and for sea bathing.

The statement of income and expenditure set out in an exhibit to the case showed that the total income which the corporation received in 1937 from the hereditaments was 11,512*l.* 18*s.* 9*d.*, and the total expenditure, after deducting sums for redemption and interest and expenditure of a capital nature, was 11,034*l.* 14*s.* 2*d.* The income which the corporation received from the swimming baths, the open-air swimming pool and the boating lake for 1937 was 4415*l.*, from the pavilion 2881*l.*, and from the foreshore more than 2000*l.*

If the hereditaments or any of them were in the rateable occupation of Redcar Corporation the amount of the gross and rateable values appearing in the valuation list in respect of each hereditament was not in issue between the parties. The questions for the opinion of the court were—(a) Whether Redcar Corporation were in rateable occupation of any, and, if so, which, of the said hereditaments. (b) Whether any, and, if so, which, of the said assessments should be restored to the valuation list.

Turner K.C. and *Harold Williams* for the North Riding of Yorkshire County Valuation Committee.

Simes and *Baucher* for the Redcar Corporation and the Guisborough Assessment Committee.

The arguments sufficiently appear from the judgments.

Cur. adv. vult.

1942. Nov. 5. VISCOUNT CALDECOTE C.J. read the following judgment. The first respondent, whom I will call the corporation, owns in fee simple the foreshore and certain other lands adjoining or abutting thereon at Redcar on the coast of Yorkshire. The corporation also are the owners of

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certain works or buildings which they constructed on the foreshore or on the other lands. Until recently the corporation have been rated as occupiers of seven separate hereditaments comprising the foreshore and the other lands and the works and buildings thereon. On March 30, 1938, however, the corporation made a proposal for the amendment of the valuation list so as to omit these seven hereditaments on the ground that the corporation were not in occupation of them for rating purposes. The contention of the corporation, put shortly, was that, as all the hereditaments were held to the use of the public, the public were the occupiers and even if, contrary to this contention, the corporation were the occupiers, they were not in beneficial occupation. The second respondent, the Guisborough Assessment Committee, accepted the proposal and deleted the assessments in question from the valuation list. The county valuation committee in due course gave notice of appeal to the court of quarter sessions. The facts have now been stated in the form of a special case for the opinion of the court on two questions, first, whether the corporation are in rateable occupation of any, and, if so, which, of the hereditaments, and, secondly, whether any, and, if so, which, of the assessments should be restored to the valuation list.

The argument on behalf of the corporation all hinged on the contention that the foreshore was purchased under statutory powers enabling the corporation to buy land for the purposes of public walks and pleasure grounds and had been dedicated, or to use the word preferred by Mr. Simes on behalf of the respondents, had been appropriated by the corporation for that purpose. All the hereditaments other than the foreshore were represented as being merely ancillary or incidental to the overriding purpose for which the foreshore had been appropriated, and, therefore, not properly included in the valuation list.

The questions of law raised by these contentions are not unfamiliar. There have been a number of decisions applying the law to varying facts. All the cases proceed from the rule of rating law derived from the Statute of Elizabeth that rateability depends on occupation. Only the occupiers are liable to pay rates. There was no controversy as to these elementary propositions. The words of Lush J. in *Reg. v. St. Pancras Assessment Committee* (1) have more than once

(1) (1877) 2 Q. B. D. 581, 588.

been referred to as a convenient and accurate statement of the law, and they will bear repetition to-day: "Occupation includes possession as its primary element, but it also includes something more. Legal possession does not of itself constitute an occupation." Buckley L.J., who cited this passage in *Liverpool Corporation v. Chorley Assessment Committee* (1), added these words: "But an owner in possession is prima facie occupier unless the occupation is shewn to be in someone else." In *Mersey Docks v. Cameron* (2), it was held in the House of Lords that trustees who were constituted by Acts of Parliament as the Mersey Docks Board and were appointed to maintain docks for the benefit of shipping frequenting the Port of Liverpool were liable to be rated as occupiers, though they drew no benefit from the occupation and occupied the docks only for the purposes of the Acts. Lord Chelmsford expressed surprise that the Statute of Elizabeth was still in need of interpretation, but it was evident, he said, that the exact meaning of the important word "occupier" in the rating clause of that Act must be regarded as hitherto an unsettled question. It was there pointed out that the words "beneficial occupation," which were sometimes used, did not appear in the Statute of Elizabeth, but that the words, when used to describe the nature of the occupation which would support a rate, do not mean that the occupation should be beneficial to the occupiers but that it is sufficient if the property be capable of yielding a clear rent over and above the necessary outgoings: see per Lord Westbury L.C. (3). The construction put on the Statute of Elizabeth in that case was applied by the Court of Appeal in *West Bromwich School Board v. Overseers of West Bromwich* (4), where the headnote sufficiently states the decision. "A school board are rateable to the relief of the poor in respect of a public elementary school occupied by them, whether they are owners or lessees of the site thereof." Lord Coleridge C.J. in the Divisional Court said (5) that there was an occupation of property unquestionably capable of being valuable in somebody's hands because the school board themselves paid rent for it. "The facts, therefore," he said, "in the present case shew that the property in the hands of an ordinary tenant is capable of producing a profit—a profit

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(1) [1912] 1 K. B. 270, 287.

(2) (1861) 11 H. L. C. 443.

(3) Ibid. 501.

(4) (1884) 13 Q. B. D. 929.

(5) Ibid. 935.

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"to the occupier because he is willing to pay rent for its occupation. The property, therefore, being manifestly in itself and in its nature valuable, there is no ground within the decision of the House of Lords" (that is, in the *Mersey Docks* case (1)) "to exempt the occupier from rateability." This decision was affirmed in the Court of Appeal where Brett M.R. said (2): "If the property has no rateable value, it must be rated at nothing. As to property which the school board rent, could the owner find a tenant who would pay him any rent? That depends on the benefit to be derived from the occupation." Bowen L.J. (3) in his judgment used an expression which reappears in many of the later cases. "If land is by law struck with sterility when in any and everybody's hands, so that no profit can be derived from the occupation of it, it cannot be rated to the relief of the poor."

It will be observed that these two decisions deal not with the question of occupation or no occupation but with the question whether the occupation was a beneficial one. The earlier question, however, whether there was occupation arose in *Hare v. Churchwardens of Putney* (4). The Metropolitan Board of Works had bought Putney bridge from the Fulham Bridge Company under the provisions of an Act of Parliament which abolished the tolls on the bridge. The bridge company were assessed in poor rate for a period extending beyond the date of the transfer of the bridge to the Board of Works. Under the provisions of an Act of Parliament to which it is not necessary further to refer, the Fulham Bridge Company claimed to be entitled to be relieved from payment of rates in respect of the period after they ceased to be occupiers of the bridge. This claim could only succeed if the Metropolitan Board of Works had succeeded or come into the occupation. The claim failed. Bramwell L.J. said (5) that the question which the court had to consider was whether, the bridge company having ceased to be occupiers, anybody else had occupied so as to be liable for the portion of the rate after the bridge company ceased to be occupiers. He thought there was no evidence of anyone else being occupiers. "I cannot find that the Metropolitan Board of Works are the occupiers of this bridge. No doubt the property is in them, and the

(1) 11 H. L. C. 443.

(2) 13 Q. B. D. 941.

(3) Ibid. 943.

(4) (1881) 7 Q. B. D. 223.

(5) Ibid. 231.

"property draws to it the possession. An action of trespass to the bridge would have to be brought by them, but that does not make them occupiers so as to be liable to be rated."

Brett L.J. said (1) that the Metropolitan Board of Works were no more occupiers of the bridge than the owner of a street is the occupier of a street after it had been dedicated to the public. The Board of Works had no power to do anything to or on the bridge except keep it up for the benefit of the public. He afterwards dealt with the question of beneficial occupation and held that the Board of Works were not liable to be rated "both on the ground that they are not occupiers and, secondly, on the ground that if occupiers they are not and never could be beneficial occupiers." The same line of reasoning was applied in *Lambeth Overseers v. London County Council* (2), generally known as the *Brockwell Park* case. There had been an assessment on the London County Council in respect of a number of hereditaments which together comprised Brockwell Park. The land had been bought by the London County Council under powers conferred on them by the London County (General Powers) Act, 1890, enabling them to purchase that land and to hold it as a park and to "lay out maintain and preserve the same and every part thereof as a park for the perpetual use thereof by the public for exercise and recreation." There was power also to enclose the lands, to adapt the buildings thereon for the public benefit and to erect lodges for park-keepers and such other buildings as the county council thought requisite for refreshment rooms, band-stands and other conveniences. The special case stated that all these powers were strictly ancillary to the maintenance of the park in perpetuity for the use of the public and that the necessary expenses of maintaining the park with the buildings on it far exceeded any sums of money derived from licences for the supply of refreshments in the park or for grazing rights or otherwise. The decision of the House of Lords is to be found in the speeches of Lord Halsbury L.C. and of Lord Herschell. The Lord Chancellor held that there was no rateable occupation by anybody. "The public," he said (3), "is not a rateable occupier," and the fact that the park was vested in the county council did not make them the occupiers. The county council were "merely custodians and trustees for the public." He agreed with opinions expressed in the

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(1) 7 Q. B. D. 233.

(3) Ibid. 630.

(2) [1897] A. C. 625.

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Court of Appeal on the question of the rateability of an occupation where an occupation exists. "No tenant," he said, "would give anything for an occupation which would not give him a capacity to earn more than the rent which he is called upon to pay for it Once it has been found that the occupation cannot as a matter of law be a beneficial occupation there is an end of the question Here there is no possibility of beneficial occupation to the county council; they are incapable by law of using it for any profitable purpose; they must allow the public the free and unrestricted use of it." Lord Herschell agreed on both points. He was not satisfied that the county council were occupiers of the park for rating purposes in spite of the fact that the legal possession was vested in them. "They seem to me," he said (1), "to be merely custodians or trustees to hold it and manage it for the use of the public."

These decisions and the grounds on which they are based state the law in plain terms, but it has not always been found easy to apply the law to the facts of a particular case. The number of cases in which these questions had to be considered is legion and many of them were brought to our attention. I do not propose to refer to them by actual citation, with one exception. Exemption from rates was given to Liverpool Corporation by the decision of the Court of Appeal in *Liverpool Corporation v. West Derby Assessment Committee* (2). It appears from the head-note, which conveniently summarizes the facts, that Liverpool Corporation, though not charged with the duty of providing a public park, were empowered by statute (the Liverpool Improvement Act, 1865) to purchase land which they might think suitable for public parks or playgrounds and places of recreation for the inhabitants of the borough and to lay out and appropriate the same for any of such purposes. They also had power to sell or lease all or any part of the lands so acquired which would not be required for the purposes of the Act. In exercise of these powers Liverpool Corporation purchased land which they formed into a park and appropriated to the public use. They made a by-law under which the park could be closed for not more than seven days in any one year, on which occasions the corporation might allow persons to use the park on payment of a charge for admission. The average cost of maintaining the park for the preceding five years amounted to 3525*l.* per annum. The average annual

(1) [1897] A. C. 632.

(2) [1908] 2 K. B. 647.

revenue derived therefrom for the same period amounted to 62*l.* 10*s.*, this revenue being derived from letting two bowling greens and a boathouse and allowing persons on payment of small sums to have keys enabling them to obtain admission into the park. The contention of Liverpool Corporation was that they were not liable in law to be rated in respect of the park and bowling greens on the grounds that they were not occupiers, and that, if they were occupiers, still they were not liable to be rated in respect thereof. The corporation succeeded. In the Divisional Court Lord Alverstone C.J. said (1) that for all practical purposes the case was covered by the decision in *Manchester Corporation v. Chorlton Union Assessment Committee* (2). He then dealt one by one with three points of difference on which it was sought to distinguish the decision in that case. The only one of these three grounds which I need notice was that the land in the Liverpool case was not permanently appropriated for the purpose of a park by the statute. Lord Alverstone referred to the argument on behalf of the assessment committee that the land could not be said to have no rateable value unless it was struck with sterility to all time. He said (3) that the land in question, so far as human foresight extended, would be a park devoted to the public for generations, and on that ground he thought the suggested distinction was not enough to take the case out of the principle of the *Brockwell Park* decision (4). Similar arguments were advanced on behalf of the assessment committee in the Court of Appeal where it was practically admitted (5) "that the case was governed by the *Brockwell Park* case (4) "unless the points suggested during the argument destroyed "the effect of that decision so far as applicable to the particular case under consideration." All three judgments rejected the appellants' contentions. Sir Gorell Barnes, P., declared that the park was intended to be dedicated to the public for the public use alone and having discussed the other suggested difference he held the Liverpool Corporation entitled to succeed. We were invited by counsel for the respondents to decide the present case in the same way. He relied very strongly on the decision in *Liverpool Corporation v. West Derby Assessment Committee* (6). He asked the court to say that the present case was in no way different from

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(1) [1908] 2 K. B. 652.

(2) [1899] 15 T. L. R. 327.

(3) [1908] 2 K. B. 653.

(4) [1897] A. C. 625.

(5) [1908] 2 K. B. 662.

(6) Ibid. 647.

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that case which gave effect to the principles laid down in the *Putney Bridge* (1) and the *Brockwell Park* cases (2).

I turn, therefore, to the facts as found in the case stated for our opinion. It would be to no purpose to examine in detail the statutory powers under which Redcar Corporation acquired the various pieces of land and erected buildings and executed works thereon. Suffice it to say that the lands were all purchased by agreement between 1923 and 1933 under s. 164 of the Public Health Act, 1875, which enabled the corporation to purchase and maintain "lands for the purpose "of being used as public walks and pleasure grounds." The buildings and works were erected and executed by the corporation under the same section and also under Part VI. of the Public Health Acts Amendment Act, 1907, which gave the corporation further powers as to parks and pleasure gardens. Loans were raised and sanctioned by the Minister of Health for "purposes of public walks and pleasure grounds." This last description of the objects for which the loans were raised was said to be descriptive also of the use to which in fact the foreshore and other lands were appropriated. The buildings and works were represented by Mr. Simes as merely incidental or ancillary to the use of the foreshore as a great public pleasure ground. What do I find when I look at all the seven hereditaments as a whole? It may fairly be assumed that the public used the foreshore in precisely the same manner before and after the acquisition. The real difference which the purchase made in the use to which the foreshore was put was that the corporation obtained the right to let sites in the summer season to suitable applicants for the purpose of erecting roundabouts, swings, kiosks and stalls (principally for amusements and the sale of refreshments) and generally for other purposes such as the provision of deck chairs and bathing tents during the summer season. From all the various lettings and licences granted by the corporation in this way an income of about 2000*l.* per annum was received in the only year for which the accounts are exhibited, namely, 1937-1938. The covered swimming bath, the open air swimming pool and the boating lake were sources of a substantial revenue in the same year, exceeding 3000*l.* The new pavilion which was built on a piece of the foreshore, and the two lock-up shops earned over 2000*l.* This showed an actual profit on those last-mentioned hereditaments in excess of expenditure

(1) 7 Q. B. D. 223.

(2) [1897] A. C. 625.

other than the amounts charged for redemption of capital and interest in respect of capital expenditure. The three last-mentioned hereditaments, I pause to observe, are entered from the promenade, which is not part of the foreshore or of any of the acquired lands. The total income, after deducting unemployment grants, was 11,512*l.* 18*s.* 9*d.*, and the total expenditure, after deducting sums for redemption and interest and expenditure of a capital nature, was 11,034*l.* 14*s.* 2*d.* This is a very different state of things from that which existed in the Liverpool case, where the average annual revenue derived from the park for the past five years amounted to the sum of 62*l.* 10*s.*, whereas the average cost of maintaining the park for the same period amounted to the sum of 3525*l.* per annum. Looking at the whole enterprise, for that seems to me a proper word to describe all these activities of the corporation, I have come to the conclusion that, although, no doubt, it provided a great deal of interest and amusement as well as recreation for the public resorting to the foreshore and other places, the enterprise was really carried on by the corporation with the object of providing a great place of popular entertainment. Over and above the capital expenditure the corporation cannot, so far as the figures show, be said to have been put to any expense which they were not able to meet out of the income they received from the various hereditaments. It is not difficult to imagine a substantial rent being paid either by the corporation or by some amusement contractor for the privilege of being able to earn the very large revenue which the corporation has in the past received. In this connexion I may refer to a passage from Lord Herschell's speech in *Lambeth Overseers v. London County Council* where he said (1): "It seems clear that the "park and the buildings thereon can have no rateable value. "No tenant would give anything for them, seeing that every "part of them is dedicated to the public use, and that the small "sums of money which might be received in respect of them "would, as the case finds, be more than absorbed by the "expenses of keeping them in order."

The facts may be looked at from another point of view. The basic principle on which the *Brockwell Park* case (2) was decided was that, although the legal possession was vested in the county council, they were "merely custodians or trustees "to hold it and manage it for the use of the public." As Lord

(1) [1897] A. C. 631.

(2) Ibid. 625, 630.

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Halsbury said, the county council were incapable by law of using the park for any profitable purpose. They must allow the public the free and unrestricted use of it. This certainly would not be an accurate description of the position of Redcar Corporation. I do not attach any importance to the fact that there is nothing to show any irrevocable dedication of this land and works and buildings to the use of the public, but, in truth and in fact, these hereditaments, taken as a whole, are not used so as to allow the public the free and unrestricted use of them. As I have shown, the use which is permitted is very largely dependent on payment of sums for admission to or for use of the works and buildings. So far as the foreshore is concerned, the corporation use it, not merely to provide amenities for the public, but also to make a revenue towards the expense which they have incurred. It is not disputed that it is necessary, in order that the corporation should be rateable, that their occupation should be a beneficial one. I take the test which Brett L.J. laid down in *Hare v. Overseers of Putney* (1). That test was "that there is no beneficial occupation, if by law no "benefit can possibly arise to the occupier." Applying that test, I think the corporation fail. On the whole I have come to the conclusion that the corporation are in occupation, and in beneficial occupation of the lands and works and buildings comprised in the seven hereditaments. I, therefore, answer the questions submitted for the opinion of the court by saying that the corporation are in rateable occupation of all the hereditaments and that all the assessments should be restored to the valuation list.

TUCKER J. I agree with the law as stated in the judgment which has just been delivered by my Lord, and in its application to the facts of this case. I have also had the advantage of reading the judgment which is about to be delivered by Cassels J., and I also agree with that. I would only add that it was agreed by learned counsel on both sides that, if it was necessary for this court to draw any inference of fact for the purpose of arriving at their decision, they should be at liberty to do so. The inference which I draw (and I think it almost irresistible) is that there never was any intention to dedicate these lands exclusively to the public, that such a dedication never took place, and that the user of these buildings is not ancillary to the use of the hereditament as a whole as a pleasure park.

CASSELLS J. read a judgment in which he stated the facts, and continued: The appellants, the county valuation committee, seek to bring the hereditaments with which we are concerned back on to the valuation list, and contend that each is capable of, and the corporation are in, beneficial occupation, and that none of these hereditaments is dedicated in perpetuity to the use of the public. The corporation, as respondents, seek to remain off the valuation list, and contend that they are neither in occupation nor in beneficial occupation, that the foreshore is a public walk or pleasure ground dedicated in perpetuity to the use of the public or dedicated to such an extent as to be incapable of beneficial occupation, and that the other hereditaments, that is to say, the two swimming baths, the boating lake, the pavilion, and the two lock-up shops, are ancillary to the use by the public of the public walk or pleasure ground in which they are situated and form integral parts thereof. Thus the issue is raised: Are the corporation in rateable occupation of these hereditaments? The rateable values of each of the hereditaments is not in issue between the parties.

The corporation have statutory authority for doing what they are doing. There is no question about that. They have the following powers: to purchase lands for public walks or pleasure grounds (Public Health Act, 1875, s. 164); to close such grounds for short periods and to let them out (Public Health Acts Amendment Act, 1890, s. 44, sub-s. 1); to let out boats on hire on a lake, s. 44, sub-s. 2; to control and regulate and to make by-laws with regard to booths and tents (Public Health Acts Amendment Act, 1907, ss. 76, 77 and 82); to make provisions for concerts and entertainments (Public Health Act, 1925, s. 56); to appropriate the land acquired for one purpose to another purpose approved by the Minister, to let the land for any term with, and for a term not exceeding seven years without, the consent of the Minister, and with the consent of the Minister to sell any land which they may possess and which is not required for the purpose for which it was acquired or is being used or to exchange it (Local Government Act, 1933, ss. 163-165); to provide public swimming baths and bathing places either open or covered and to make charges for admission (Public Health Act, 1936, ss. 221 and 222). The mere fact that the corporation are doing these things with statutory authority does not prevent their being in occupation, beneficial and rateable. The well-known passage from Lord Westbury's speech in *Mersey Docks v.*

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Cameron (1) is: " 'Occupation' to be rateable must be of property yielding or capable of yielding a net annual value, that is to say, a clear rent over and above the probable average annual cost of the repairs, insurance and other expenses, if any, necessary to maintain the property in a state to command such rent. It is in this sense that I understand the words 'beneficial occupation,' wherever it is said that to support a rate the occupation must be a beneficial one. For, on principle, it is by no means necessary that the occupation should be beneficial to the occupiers. It is sufficient if the property be capable of yielding a clear rent over and above the necessary outgoings. The only occupier exempt from the operation of the Act is the King, because he is not named in the statute, and the direct and immediate servants of the Crown, whose occupation is the occupation of the Crown itself, also come within the exemption. But this ground of exemption does not warrant many decisions which have held that property used for public purposes is not rateable; so also trustees who are in law the tenants or occupiers of valuable property upon trust for charitable purposes, such as hospitals, or lunatic asylums, are, in principle, rateable, notwithstanding that the buildings are actually occupied by paupers who are sick or insane." Lord Chelmsford in the same case, said (2): "Prima facie, therefore, a liability to the rate would seem to attach upon any occupation from which benefit is derived; and no occupier can claim an exemption unless he can find it in the Act itself, or it arises from some principle of law applicable to all cases. With respect to exemption arising from the Act itself, it is obvious that as the occupier is to be assessed according to his ability, if he derives no benefit of any kind from his occupation he has no ability in respect of it, and consequently cannot be rateable. The other exemption which does arise from the Act itself, but which is founded on a general principle of law, applies only to the Crown, which, not being named in the Act, is not bound by it. I am unable to find any ground of exemption from liability to the poor rate, either in the Act itself, or in any principle of law apart from the Act, except the two which I have mentioned, and there is nothing to indicate the intention of the legislature that lands and houses occupied for, what in some of the cases is rather loosely called 'public purposes,'

(1) 11 H. L. C. 443, 501.

(2) Ibid. 511.

"as contradistinguished from private benefit, should not be liable to the rate." Lord Herschell L.C. pointed out in *London County Council v. Erith Assessment Committee* (1) that it is not "essential to rateability that a particular occupier of the land can make a pecuniary profit by the use to which he is putting it. It is I think rateable whenever its occupation is of value." The mere fact that a local authority occupies lands or buildings for public purposes does not exempt from rateability. A school board has been held to be rateable for an elementary school: *West Bromwich School Board v. Overseers of West Bromwich* (2), and *Reg. v. School Board for London* (3), and there are many other authorities to like effect.

Reliance was placed by counsel for Redcar Corporation and the Guisborough Assessment Committee on *London County Council v. Lambeth Overseers* (4). In that case the London County Council, under powers of its General Powers Act of 1890, purchased Brockwell Park and in the Act it was enacted that the London County Council should preserve the same as a park for the perpetual use thereof by the public for exercise and recreation. A. L. Smith L.J. in the Court of Appeal said (5): "The London County Council were not empowered to let the park or any part of it, or to use any part of it in any other way than as a public park for the recreation of the public for ever. It never can be abandoned as a public park, but must remain a public park for ever, kept up at the expense of the London County Council. In considering whether a hereditament is a rateable hereditament or not, in my judgment in the first place it must be determined whether its occupation is capable of value in any person's hands whatsoever. If yes, then it is a rateable hereditament; aliter if it is not. The counsel who appeared for the London County Council very properly, in my judgment, admitted that Brockwell Park, though its rent-producing capacity was fettered as above mentioned, was a rateable hereditament; and I therefore need not embark upon the theory of land being struck with sterility in any and everybody's hands; for the question before us is whether, taking the conditions under which the London County Council were by the statute of 1890 bound for ever to occupy the park,

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(1) [1893] A. C. 562, 585.

(2) 13 Q. B. D. 929.

(3) (1886) 17 Q. B. D. 738.

(4) [1896] 2 Q. B. 25; [1897] A. C. 625.

(5) [1896] 2 Q. B. 30.

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"there are findings in this case which render the rateable value of that occupation other than nominal." In the House of Lords, Lord Halsbury L.C. said (1): "The facts which raise the question may be very simply stated. In 1891 the London County Council purchased the land and buildings which now form the park under the powers of an Act which cast upon them the perpetual obligation to maintain and preserve it, when purchased, as a park for the perpetual use of the public for exercise and recreation. The special case goes on to state some other things, which appear to me to be irrelevant. We have nothing to do with the previous history of the seventy-eight acres of which Brockwell Park consists, nor are we concerned with the question whether it would be rateable if it were otherwise held and enjoyed. The main question, and, indeed, as it appears to me, the only question, is whether it is now rateable at all, and I am of opinion that it is not. I do not think there is here a rateable occupation by anybody. The 'public' is not a rateable occupier; and I think that one sentence disposes of the case." Lord Herschell said (2): "In order to determine whether the respondents are liable to be rated in respect of the park and its adjuncts, the question which has to be answered is, at what rent, if any, the hereditaments might reasonably be expected to let, taking one year with another. Now, it is well settled that, in answering this question, regard must be had to any restrictions which the legislature has imposed upon their use, and the hypothetical tenant must be supposed to take them subject to these restrictions. Bearing this in mind, it seems clear that the park and the buildings thereon can have no rateable value. No tenant would give anything for them, seeing that every part of them is dedicated to the public use, and that the small sums of money which might be received in respect of them would, as the case finds, be more than absorbed by the expense of keeping them in order."

In my view the present case differs in many respects from the *Brockwell Park* case (3). It is true that the public have access to the walks surrounding the swimming baths and to the foreshore, but is it to be said that that excludes from rateability these hereditaments which are being conducted and managed by Redcar Corporation as places of entertainment

(1) [1897] A. C. 629.

(3) [1897] A. C. 625.

(2) Ibid. 631.

for the public on payment? These lands are not held "as a park for the perpetual use thereof by the public for "exercise and recreation." Redcar Corporation can let for seven years without any consent of the Minister, and with his consent can sell, exchange, or let for more than seven years. So far from being "struck with sterility" these buildings and lands are prolific with income as the figures show and possibly with profit. How can it be said that this occupation of these hereditaments is not of value? Redcar Corporation are doing what one would expect them to do, namely, providing attractions in various forms for those who seek amusement and entertainment during their residence, permanent or temporary, in the borough. They are catering for the pleasure seeker and holiday maker, and in doing so are taking large sums of money. The public does not occupy these seven hereditaments as it was said to occupy Brockwell Park. The corporation occupy these seven hereditaments as providers of entertainment for the public. It is said that the swimming baths and the pavilion and the boating lake and the uses to which the sites on the foreshore are put are ancillary to the use of the land or park or recreation grounds. This is an extension of the meaning of the word "ancillary" which, in my opinion, has no foundation in law or in fact. A few things such as a bowling green, seats, conveniences, shelters from bad weather, may very well be part and parcel of a recreation ground or park, but swimming baths with accommodation for eighteen hundred and fifty persons to watch the bathers and possibly contests and exhibitions, and a hall with eight hundred seats, a stage and dressing rooms, capable of presenting concerts and plays and variety shows, and used for public meetings, with two lock-up shops adjacent, and reached without setting foot on any part of the park or recreation ground, can scarcely be said to be ancillary to a park or a pleasure ground or a recreation ground by whatever name the land around is described. The same observation may well be made of the parts of the foreshore which, on payment to Redcar Corporation each season, are allocated to selected persons who provide for the public some of the features of a fair. There is not in any of these hereditaments any statutory dedication to the public. The highest at which it can be put is that Redcar Corporation is a local authority, and in the conveyance of some of these lands there is a covenant to use the land for the public benefit. That does not mean that

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the public are in occupation of these seven hereditaments in the way in which in the *Brockwell Park* case (1) it was said that the public were in occupation of the park: see per Lord Halsbury L.C. (2). Redcar Corporation are using these lands for the public benefit in what they are doing and it is not suggested that they are in breach of their restrictive covenant, but the occupation is of value to the corporation, and, incidentally, to those who hire the concert hall and the sites on the foreshore and to those who rent the shops. There is no statutory dedication to the use of the public here as there was in the *Brockwell Park* case (1) so that the land is incapable of occupation.

Mitcham Golf Course Trustees v. Ereaut (3) was cited for the respondents. That was an instance of the trustees of a golf course on a common administered under the terms of an Act of Parliament being held not to be in occupation within sch. B to the Income Tax Act, 1918. Lawrence J. said (4): "In my opinion the ratio decidendi of *Lambeth Overseers v. London County Council* (1) was that land which, by statute, "is designated to be held for the use of the public is incapable "of occupation, because the public cannot occupy it," and (5): "Here, in my opinion, there is no exclusion by the conservators "or the appellants of the public by the charge that is made, "and therefore neither the trustees nor the conservators can "be regarded as occupiers, and the common is designated by "the Act of Parliament to be managed by the conservators "for the public by setting apart such parts as they think right "for whatever games they choose. I therefore hold that the "appellants are not in occupation of Mitcham golf course "within the meaning of sch. B, nor is such occupation as they "may be deemed to have beneficial occupation, since no "hypothetical tenant would pay rent for a golf course which, "by statute, has to be managed solely in the interests of the "public." The importance attached to the effect of the statute on the land is to be noted.

The phrase "the public benefit" was considered in *Trustees of Sir J. Soane's Museum v. Joint Vestry of St. Giles and St. George* (6). The museum by statute had to be maintained for the public benefit. It was held that the rights conferred on the public by the Act were not such as to exclude all

(1) [1897] A. C. 625.

(2) Ibid. 629.

(3) (1937) 21 T. C. 239.

(4) Ibid. 245.

(5) Ibid. 246.

(6) (1900) 83 L. T. 248.

beneficial occupation on the part of the trustees and consequently the building was rateable. There again it was sought to apply the decision in the *Brockwell Park* case (1). Channell J., in the course of the argument, said (2) with regard to the *Brockwell Park* case (1): "Is not the real explanation "of the *Brockwell Park* case (1) this: Assuming that the "county council were occupiers, they were not beneficial "occupiers because they occupied subject to rights of the "public over the locus in quo, which rights entirely exhausted "the beneficial value of the thing? There were rights in the "public which exhausted every possible value of the property. "The county council occupied, if occupiers at all, subject to "the overriding rights of the public, which took away every "possible benefit to them. The public have rights all over "the park, and are entitled to wander over it in any way, and "that exhausts the entire value of their occupation. The "hypothetical tenant would have to take it subject to those "rights, and therefore it would be worth no rent to him." Grantham J., in the same case (3), made an observation with regard to Soane's Museum which, with slight alteration, I would apply to the present case. Why should the ratepayers of the county of the North Riding of Yorkshire be called on to support an additional rating burden merely because there is in their area a local authority which owns certain land over which the public have certain rights, but which is not subject to any statutory dedication for all time, and those rights do not exhaust the value of the occupation? The hypothetical tenant in this case could take each of these hereditaments and it would be worth a rent to him which would not be any the less because the public had rights of access to the surrounding land. The hypothetical tenant would prefer that the public should have access to the baths and the boating lake, the concert hall and the attractions on the foreshore which are all capable of earning money. In *London Playing Fields Society v. Assessment Committee for South West Area of Essex* (4) it was held by this court that freehold land acquired by the society with a restrictive covenant that it should henceforth be used as public ground for the purpose of the Recreation Grounds Act, 1859, but with a power to sell, with the consent of the Charity Commissioners, was rateable. Lord Hewart C.J., referring to the *Brockwell Park* case (1),

(1) [1897] A. C. 625.

(3) Ibid. 251.

(2) 83 L. T. 248, 250.

(4) (1930) 144 L. T. 233.

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said (1): "In that case the judgments in the House of Lords "all made it plain that the turning point was that there was "by statute a perpetual obligation to preserve the park for "the perpetual use of the public as a place of recreation." Later he said (2), after referring to the judgments of Lord Halsbury and Lord Herschell: "Taking those two judgments "together I think that the question whether there is any "beneficial occupation in fact is not the point. The question "is whether there can be any beneficial occupation as matter "of law, and that means whether there are any restrictions "imposed by the legislature." The matter is of no interest to county boroughs which may occupy similar hereditaments because the rates they collect are used by themselves, but it is of vital interest to county authorities which are entitled to look to boroughs which are not county boroughs for a contribution towards the county rates.

Beneficial occupation does not mean that pecuniary profit has to be established. It merely means that there must be an occupation which is of value to the occupier. There is nothing about any one of these seven hereditaments which entitles Redcar Corporation to say that it is not capable of occupation or that its occupation is of no value, or that it is occupied by the public who cannot be occupiers for the purpose of rateability. I hold that Redcar Corporation are in rateable occupation of these seven hereditaments, that these assessments should be restored to the valuation list, and that the opinion of this court to that effect should be returned to the court of quarter sessions for judgment accordingly.

Questions answered.

Solicitors for County Valuation Committee: *Sharpe, Pritchard & Co., for H. G. Thornley, Northallerton.*

Solicitors for Redcar Corporation and Guisborough Assessment Committee: *Lewin, Gregory, Torr, Durnford & Co., for H. Caldwell, Redcar.*

(1) 144 L. T. 239.

(2) Ibid. 240.

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Insurance (Motor)—Third-party liability—Liability to employee of insured excepted—Authorized driver to be treated as insured person—Extended cover subject to terms, exceptions and conditions of policy “in so far as they can apply”—Accident to fellow servant of authorized driver owing to driver's negligence—Claim of driver to indemnification under policy.

By a motor insurance policy the plaintiff's employers were indemnified against liability in respect of injury to third parties, excluding injury to any person in their employment arising out of and in the course of the employment. The policy further provided that the insurers “will treat as though he were the “insured person any person who is driving such vehicle on the “insured's order or with his permission . . . provided that “such person shall as though he were the insured observe, fulfil “and be subject to the terms conditions and exceptions of this “policy in so far as they can apply.” While the plaintiff, in the course of her employment, was being driven by the authorized driver of her employers in a motor-van belonging to them, she was injured as the result of the negligence of the driver :—

Held, that the exception excluding liability for injury to a person in the employment of the plaintiff's employers did not apply since the plaintiff was not in the employment of the authorized driver, and, therefore, he could claim to be indemnified against any damages which she might recover from him.

APPEAL from Oliver J.

By a policy of motor insurance by which Dickerson Brothers, the employers of the plaintiff, were insured by the Road Transport and General Insurance Co., Ltd., against the risks therein specified it was provided, by section II., which was headed “Liability to third parties,” para. (1.): “The company “will indemnify the insured against liability at law for com- “pensation and claimant's costs and expenses in respect of :— “Death of or bodily injury to any person caused by or arising “out of the use of any vehicle described in the schedule hereto. “Provided always that the company shall not be liable in “respect of . . . (B) death of or bodily injury to any “person in the employment of the insured arising out of and “in the course of such employment.” By para. (2.): “In “terms of and subject to the limitations of and for the purposes “of this section the company will treat as though he were the “insured person any person who is driving such vehicle on “the insured's order or with his permission provided (A) that “such person is not entitled to indemnity under any other

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"policy ; (B) that such person shall as though he were the insured observe fulfil and be subject to the terms exceptions and conditions of this policy in so far as they can apply." On May 6, 1939, while the plaintiff was a passenger in a motor-van belonging to her employers which was being driven by their authorized driver, W. H. Robson, she was involved in an accident caused by the negligence of Robson and received personal injuries. The plaintiff consulted the defendant, F. A. Cox, a solicitor, with reference to obtaining compensation for the injuries she had received as the result of Robson's negligence. The defendant did not himself advise her on the matter, but left it to his managing clerk, one Mills, who was not an admitted solicitor, but for whose advice to the plaintiff the defendant accepted responsibility. Mills advised the plaintiff that no claim could be made against her employers as she and Robson were fellow employees of the firm. He, accordingly, recommended her to accept the compensation to which she was entitled under the Workmen's Compensation Act. The plaintiff prosecuted the claim as suggested and she eventually received 660*l.* in settlement which was inadequate to compensate her for the serious injuries which she had suffered. Later, the plaintiff received independent advice that she could have sued Robson, as Dickerson Brothers' policy contained a provision under which the insurance company took the risk of the liability of a person in Robson's position to a person in the position of the plaintiff so that the payment of any damages which she might have recovered against Robson would have been assured. She, accordingly, brought the present action against the defendant claiming damages for the negligence of his managing clerk. Oliver J. held that, by the terms of the policy, if a claim had been made against Robson and liability had been established or admitted, the insurance company would have been liable to indemnify Robson under the policy, and he gave judgment for the plaintiff for 1477*l.* 19*s.* 6*d.* damages. The defendant appealed.

Samuels K.C. and *Fox-Andrews* for the defendant.

Henry Burton for the plaintiff.

SCOTT L.J. The last seven words of proviso (B) to para. (2.) of section II. of the policy—"in so far as they can apply"—are necessarily added because under para. (2.) a person other than the primary insured, Dickerson Brothers, is treated as

also covered by the policy, and it is obvious that various provisions in the policy applicable to the primary assured will not apply in the case of that other person. In my view, the words "in so far as they can apply" mean that such of the terms, conditions and exceptions of Dickerson Brothers' insurance as are reasonably applicable to the insurance of their driver's liability are incorporated in the driver's cover, but in so far as they are not so applicable they are to be disregarded. The provision so made is clear, and it is a very natural provision to be made, having regard to the terms of the Road Traffic Act, 1930, s. 36. I can see no escape from the conclusion that the liability of Robson was covered by the insurance, so that, if an action had been brought against him, the plaintiff could have recovered the payment of his liability ultimately through the insurance company.

Mr. Samuels has argued strenuously that the proviso to para. (1.) of section II. shuts out this interpretation of the second paragraph. In my view those provisions are addressed to the case of Dickerson Brothers incurring the liability and to the insurance of them for their own protection under the statute; but, even if they are read as conceivably in some circumstances applicable to the case of the insurance of a driver authorized by them to drive the insured car, it does not seem to me that they are sufficient to affect the primary object of the quite separate paragraph (2.), namely, the insurance of the driver. This view of the entirely separate character of the additional cover is emphasized, I think, by the provisos attached to it. The first is that "such person"—that is the authorized driver—"is not entitled to indemnity under any other policy." The second is: "that such person shall as though he were the insured"—that is, the primary assured—"observe fulfil and be subject to the terms exceptions and conditions of this policy in so far as they can apply." Para. (2.) of section II., is, in my view, a definite insurance of the driver against third-party liability, and it should have been obvious to the solicitor's managing clerk that no question of the relationship of the person injured to the driver or of the doctrine of common employment could arise. The provision in para. (1.) (B) of section II., excluding liability to an employee where the primary insurance is of the employers is wholly out of place in para. (2.) which relates to the insurance of their driver. There are no words, in my view, to justify that incorporation in para. (2.).

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For these reasons I think that the appeal ought to be dismissed, although I decide in favour of the plaintiff on grounds which are somewhat different from those adopted by Oliver J.

MACKINNON L.J. I agree that this appeal fails. When the plaintiff met with this accident, she naturally thought that somebody in some way ought to compensate her for the injuries she had received. There were three possible sources of that compensation. First, the plaintiff was obviously entitled to the rather cheese-paring compensation afforded to her by the Workmen's Compensation Act. Secondly, she might make a claim against Dickerson Brothers, alleging that she had been injured by the negligence of their servant. There would then, however, clearly be grave danger that Dickerson Brothers would be able to raise the defence of common employment. If that difficulty could have been overcome by arguing that under the view of the rather discredited doctrine of common employment recently introduced in the House of Lords, the plaintiff and Robson were not, for the purpose of that doctrine, in common employment, she might have got damages against Dickerson Brothers, but it would not follow that they would be able to pay the damages and it would be necessary to ascertain whether they were insured, and, if so, whether the insurance would ensure the recovery of the damages. It would then be found that they were not indemnified under this policy because the liability was in respect of bodily injury to the plaintiff who was in their employment. So the second possible means of obtaining compensation by making a claim on Dickerson Brothers did not look very hopeful. There remained the third possibility of a claim against Robson for damages. That was almost certain to succeed as Robson had clearly been negligent and there could be no question of common employment or any defence of that sort. The solicitor, however, might well have supposed that Robson was not a man of means, so those advising the plaintiff had to ascertain whether there was somebody behind Robson of sufficient solvency to make a judgment against him of value. On investigating the policy, they would, I think, at once have seen that, if they secured a judgment against Robson, they would have behind him his indemnification by the insurance company: see para. (2.) of section II., the effect of which would be that, as Robson was driving on Dickerson Brothers' order or with their permission,

he was to be treated as though he were the insured person, provided that he should, as though he were the insured, "be subject to the terms exceptions and conditions of this "policy in so far as they can apply." If a claim were made in Robson's name against the insurance company to recover any damages which he had been ordered to pay the plaintiff, is there anything in the "terms exceptions and conditions of this "policy" which would bar that claim? Mr. Samuels chiefly relied on the provision in para. (1.) (B) that the company are not to be liable in respect of bodily injury to any person in the employment of the insured. He says that the plaintiff was in the employment of Dickerson Brothers and that, therefore, Robson's claim in respect of liability to her must be barred. I do not agree with that. When Robson's rights to recover under this policy are being considered, he is to be treated as though he were the insured and he is to be subject to the terms and conditions of the policy. A claim made by him in respect of a liability to pay damages to the plaintiff would only be barred under that clause if she was in Robson's employment. The fact that she was in the employment of Dickerson Brothers, who were not making the claim, would be irrelevant and immaterial.

In my view, Oliver J. was right in holding that there was negligence—although very intelligible negligence, considering the obscure and difficult questions involved—on the part of the defendant's clerk in advising the plaintiff as he did. For these reasons, I think this appeal should be dismissed.

GODDARD L.J. I agree. This court has not been asked to reverse the finding of the judge on the question whether the defendant through his clerk was guilty of negligence. I only say it seems to me that the only negligence which can be alleged against Mr. Mills is that he took on himself to decide a somewhat difficult question. Mr. Samuels has accepted the position that the defendant is liable, provided that damage can be shown. The only question, therefore, is whether on the construction of the policy, if Robson had been held liable, he could have recovered under it. I have given the best consideration I can to Mr. Samuels argument and I think that there is no doubt that if anyone had asked the company if this was the sort of risk they were intending to insure against, they might have said that it was not, just as, I am sure, the General Accident Corporation would have said that they did

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We are concerned, however, not with what the company intended, but with what they undertook by the policy, and by its terms, I think that they undertook to treat an authorized driver as though he were the insured, at the same time making him subject to the conditions of the policy. I can only read that as meaning in the present case that when a claim is made against the authorized driver the name of Robson is to be substituted in the policy for that of Dickerson Brothers.

That that is the proper conclusion is, I think, shown by Lord Wright in *Digby v. General Accident Fire and Life Assurance Corporation, Ltd.* (1). The clause on which reliance was placed in that case was: "The insurance under this section shall also extend to indemnify in like manner any person whilst driving any automobile described in the schedule hereto on the order or with the permission of the policyholder, provided there is no other insurance subsisting under which such person may be indemnified, and that such person shall, as though he were the policyholder, observe, fulfil and be subject to the terms, exceptions and conditions of this policy in so far as they can apply." The words of the policy in the present case are certainly as strong, and I should have thought stronger, in favour of the plaintiff's contention than those in *Digby's* policy. Lord Wright in his speech said (2): "The identity of the insured may change under the operation of cl. (3.) and in like manner the identity of the third party, in facts like those in question, may change. The policyholder thus may become under cl. (3.) the third party to whom the new insured, the chauffeur, has become liable. The policy, in its primary import, is no doubt a single insurance for the benefit of a single insured. But cl. (3.) involves that it may during its currency cover a new insured, in place for the time of the original insured, if the circumstances postulated by cl. (3.) come into effect. The new insured, it is to be noted, is by the terms of cl. (3.) to 'observe fulfil and be subject to the terms exceptions and conditions of the policy so far as they apply.' Thus he is bound by condition 8, the arbitration clause, as the Court of Appeal, agreeing with the court below, held. In other words, throughout the conditions 'policyholder' has to be read, so far as it can apply beyond the policyholder, as meaning

(1) [1943] A. C. 121.

(2) Ibid. 140.

“policyholder or any other person who is insured by virtue of s. 2 (3).” That is exactly the view which I have tried to express. Therefore, in the policy before us, if you substitute a new policyholder for Dickerson Brothers you find that Robson is insured. You then find that the plaintiff would not have been one of the persons who, if they had claimed, would have been held to be excluded from the policy by reason of the fact of being a servant of the policyholder. She was not a servant of Robson, who alone is to be regarded as the policyholder for the purpose of this claim.

I think, therefore, that Oliver J. was right in his conclusion, which was substantially the same as that which I have reached, although he based his decision on slightly different grounds.

Appeal dismissed.

Solicitors for plaintiff: *Hair & Co.*

Solicitors for defendant: *Malkin, Cullis & Co., for W. L. Kitchen, Lincoln.*

P. B. D.

JONES v. AMALGAMATED ANTHRACITE COLLIERIES, LIMITED.

Workmen's compensation—Assessment—Partial incapacity—“Earnings”—Workman conscripted for army—Army pay less than pre-accident wages—Workmen's Compensation Act, 1925 (15 & 16 Geo. 5, c. 84), s. 9, sub-s. 3 (i.).

Before June 15, 1932, the workman was employed as a collier, his wages averaging 2*l.* 10*s.* 8*d.* a week. On that date he met with an accident which rendered him totally incapacitated for work and he was paid compensation on that basis until 1935, when he began work above ground. Until November 15, 1937, he received compensation as being partially incapacitated, based on the difference between his earnings before the accident and those for his work above ground, but then, owing to a rise in wages, his earnings at his work above ground exceeded 2*l.* 10*s.* 8*d.* a week and his compensation for partial incapacity ceased. By September, 1940, his average weekly earnings had risen to 3*l.* 15*s.* 4*d.* On September 30, 1940, while still partially incapacitated, he was called up for service in the army under the National Service (Armed Forces) Act, 1939, and he had since been serving as a gunner, with pay and allowances amounting to 2*l.* 0*s.* 9*d.* a week. On May 11, 1942, he applied, under s. 9,

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sub-s. 3 (i.) of the Workmen's Compensation Act, 1925, for compensation for partial incapacity on the ground that before June 15, 1932, he was earning 2*l.* 10*s.* 8*d.* a week and was now earning 2*l.* 0*s.* 9*d.* a week, with the result that he was entitled to 4*s.* 11½*d.* a week, being half the difference between his pre-accident wages and his army pay and allowances :—

Held, that the earnings referred to in s. 9, sub-s. 3 (i.), must be earnings which are affected, at least in some degree, by the workman's continuing incapacity resulting from the injury, and as, in the present case, his army pay and allowances were not so affected, they were not earnings within the sub-section and could not be regarded in considering his right to compensation.

Per MacKinnon and Goddard L.J.J. "The weekly amount "which he is earning" in the first part of sub-s. 3 (i.) is contemplated as being earned in some suitable employment or business. Army pay is not so earned, and, consequently, it was not what the workman was earning within the meaning of that part of the sub-section. It followed that the alternative words "or is able "to earn" applied, and, as the workman was able to earn more than his pre-accident wages in some suitable employment or business, he was not entitled to compensation.

APPEAL from Judge Morris sitting at Ammanford county court as arbitrator under the Workmen's Compensation Acts.

The facts are stated in the headnote. The arbitrator found that the workman was still partially incapacitated from doing the work which he was doing before the accident; that, but for his being called up for military service, he would be earning 3*l.* 15*s.* 4*d.* a week; and that the cause of his inability to earn that amount was due, not to any incapacity, but solely to his being conscripted under the National Service (Armed Forces) Act, 1939. He held, however, that he must take the first alternative in s. 9, sub-s. 3 (i.), of the Workmen's Compensation Act, 1925 (1), and consider what the workman was now earning in the army, and, as that amount was less than the workman's pre-accident wages, he made an award in his favour for the amount of compensation claimed. The employers appealed.

(1) Workmen's Compensation Act, 1925, s. 9, sub-s. 1: "The "compensation under this Act "where . . . partial incapacity "for work results from the injury "shall be a weekly payment during "the incapacity of an amount "calculated in accordance with the "rules hereinafter contained."

Sub-s. 3 (1): "... The weekly

"payment in case of partial "incapacity shall be one-half the "difference between the amount of "the average weekly earnings of the "workman before the accident and "the average weekly amount which "he is earning or is able to earn in "some suitable employment or "business after the accident,"

Carey Evans for the employers. The workman was not entitled to compensation as he cannot show that his present average weekly earnings are in any way affected by continuing incapacity resulting from the accident. The arbitrator based his decision on a line of cases beginning with *Heathcote v. Haunchwood Collieries* (1), and culminating in *Blakemore v. Delta Mill* (1919), *Ld.* (2), which laid down the principle that the man's actual earnings ought as a general rule to be taken into account rather than his potential earnings, but the authorities show that regard may be had to potential earnings whenever it can be shown that the actual earnings are no measure of the incapacity resulting from the injury, e.g., when it is proved that the workman could earn more if he tried, or that a fresh injury or illness has reduced his capacity to earn, or that, as in the present case, some supervening event unconnected with the accident has compelled the workman to work or serve at lower wages than he could earn in the labour market, notwithstanding his injury.

Paull K.C. and *Gerwyn Thomas* for the workman. The arbitrator was right. The Act provides that where a workman is reduced from one category of employment to another by an accident, and by reason of that reduction is prevented from earning his old wages, his compensation is to be half the difference between his pre-accident and his post-accident wages. That rule is subject to one exception only, namely, that recourse may be had to the alternative offered by the words "or is able to earn" in the second part of the sub-section, if the employer can prove that the workman has deliberately chosen to accept less wages than he could get. In *Blakemore v. Delta Mill* (1919), *Ld.* (2) Lord Thankerton said that the words "he is earning" stand unqualified as the first alternative, and the exception was laid down by Lord Dunedin in *Heathcote v. Haunchwood Collieries* (1). That pay in the services can be earnings within the meaning of the Workmen's Compensation Acts, was admitted in the court below and is established by the decisions in *Brandy v. S.S. Raphael (Owners of)* (3); *Port of London Authority v. Gray* (4); and *Doncaster Amalgamated Collieries, Ld. v. Leech* (5).

Cur. adv. vult.

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(1) [1918] A. C. 52.

(2) (1935) 28 B. W. C. C. 193.

(3) [1911] 1 K. B. 376.

(4) [1919] 1 K. B. 65.

(5) [1941] 1 K. B. 649.

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MACKINNON L.J. The material section of the Act (s. 9) begins: "The compensation under this Act where
"partial incapacity for work results from the injury shall be
"a weekly payment during the incapacity calculated in
"accordance with the rules hereinafter contained," and the
rule treated by the judge as the material one is sub-s. 3 (i.):
"one-half the difference between the average weekly earnings
"before the accident and the average weekly amount which
"he is earning or is able to earn in some suitable employment
"or business after the accident." The absence of any commas
leaves it uncertain whether this should read, "the average
"weekly amount which he is earning, or is able to earn in
"some suitable employment or business, after the accident,"
or "the average which he is earning, or is able to earn, in some
"suitable employment or business, after the accident." I will
assume the former, but the reference to employment or business
in the alternative I think shows that "the amount which he
"is earning" is contemplated as being in some employment
or business, that is, under a contract.

In my opinion, the 2*l.* 0*s.* 9*d.* which the workman is receiving as pay and allowances in his status as a conscript is not what he is "earning" in any employment or business. He is not earning anything in any employment or business, and, therefore, the alternative has to operate. On that alternative he is able to earn 3*l.* 15*s.* 4*d.* a week at his work above ground but for the fact that the operation of the Act of 1939 has debarred him from engaging in any employment or business. The judge records that "the respondents do not dispute that army pay
"or allowances are earnings," but this is a question of law as to the meaning of the section, and I do not see how any such admission could bind the judge, or binds me, to agree with it.

A good many cases were cited to us, but I do not find that any of them lay down any principle which solves the present problem. The Scots case of *Thomson v. John Watson, Ltd.* (1) in 1915, and the English case of *Port of London Authority v. Gray* (2) in 1918, were cases in which a workman, who was receiving, or had a right to, partial compensation had voluntarily enlisted in the army. In the first, it was held that the workman could not claim that his army pay was, within sch. I. (3.) of the Workmen's Compensation Act, 1906,

(1) (1915) 9 B. W. C. C. 428,

(2) [1919] 1 K. B. 65.

"the weekly amount which he is earning," and that the arbitrator ought to inquire, under the alternative, "what he "is able to earn in some suitable business or employment."

The second case was a claim by the employers to reduce an allowance for partial incapacity on the ground that the amount of the weekly pay and allowances to the man in the army was greater than the amount which he had been treated as capable of earning. The Court of Appeal allowed this claim, but Duke L.J. emphasizes that it is a case of a man who has voluntarily enlisted in the army and expressly reserves the question as to the effect of a man serving as a conscript. In my opinion this appeal should be allowed with costs, and the workman's claim for 4s. 11½d. a week should be dismissed.

The consideration that this result seems in accordance with justice is, perhaps, irrelevant in any question that arises on the technical wording of this statute, but at least it is a result which seems to accord with the whole policy and scheme of the Act. That policy and scheme is that a man shall be paid compensation for injury based on the difference between what he earned before, and can earn after, the injury. That this man has pretty well recovered from the injury seems shown by the fact that he must have been passed as medically fit as a gunner. He is admittedly fit to earn more than before the accident. His claim is not based on any continuing result of the injury or on incapacity resulting therefrom. It is really a claim that the employers shall compensate him for his misfortune in being compelled to serve as a soldier at the rate of pay thought sufficient by the authorities. To call this "compensation" for "partial incapacity for work resulting "from his injury" in June, 1932, seems fantastic. Suppose the position had been reversed, that is, that his earnings above ground in September, 1940, were only 2l. os. 9d., so that he was being paid 4s. 11½d. a week compensation. He is then called to the colours, and in the army receives pay and allowances exceeding 2l. 10s. 8d. I do not think the employers could have claimed to review the weekly payment under ss. 11 and 12. The fact that he was getting 2l. 10s. 8d. a week from the army would be as irrelevant to such a claim as would be proof that a rich uncle from Ballarat had left him an annuity of 500l. a year.

GODDARD L.J. I have had an opportunity of reading the judgment delivered by MacKinnon L.J., and I entirely agree with it.

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DU PARCQ L.J. (read by Goddard L.J.). Sect. 9, sub-s. 3, of the Act lays down rules for calculating weekly payments by way of compensation in the case of partial incapacity. When a workman who has been partially incapacitated by accident is earning wages which ex hypothesi are less in amount than those which he earned before he was so incapacitated, his compensation is to be arrived at by deducting the post-accident from the pre-accident earnings. It is now well settled that it is not open to the employer to contend that, even if the workman had not been incapacitated, his earnings might still have been reduced through economic depression. The words "which he is earning," as Lord Thankerton has said, "stand unqualified": *Blackmore v. Delta Mill* (1919), *Ld.* (1). But, although the words "stand unqualified," the circumstances may be such that the wages which a man is receiving are not properly to be regarded as his "earnings" within the meaning of the sub-section at all. Prima facie one has only to look at what he is being paid for the work he is doing after the accident to see what his earnings were. As Lord Blanesburgh put it, however, in the case already cited, this figure may be "displaced for some sufficient cause," and it will then be replaced by the amount which he "is able to earn." One "sufficient cause" is proof to the satisfaction of the arbitrator that the man would be earning more "if he took proper steps to get the most remunerative employment he could find": *Heathcote v. Haunchwood Collieries*, per Lord Dunedin (2). At first sight Lord Dunedin's dictum seems to import into the sub-section a qualification of the words "which he is earning" and so to run counter to the statement of Lord Thankerton. To resolve this apparent difficulty, it is necessary to consider on what principle Lord Dunedin's exception was founded. Lord Dunedin was, of course, construing the sub-section and not seeking to amend it. To construe it one must read it in its context, and the intention of s. 9, read as a whole, is plain. The object of the section is to provide a method of computing the amount of compensation. Compensation for what? For incapacity to work (and so to earn wages) resulting from an injury. If it can be shown that a man's earnings have been reduced for some reason which has nothing whatever to do with his incapacity, then they have no relevance to the matter in hand, and to regard them as representing "the amount which he is

(1) 28 B. W. C. C. 193, 200, 208.

(2) [1918] A. C. 52, 56.

"earning" within the meaning of the sub-section would be to ignore the whole purpose of the section, which is what I have stated, and assuredly is not to give compensation to a workman when the lessening of his ability to earn results solely from a cause wholly unconnected with the injury.

The fact that economic depression or some other such cause has reduced the general level of wages is no ground for saying that actual earnings are shown to be an irrelevant consideration. The words of the sub-section, as has been authoritatively held, do not permit such a construction. It must have been contemplated by the legislature that many causes might contribute, together with the incapacity, to bring about a reduction in earnings, and it is, perhaps, fortunate that the draftsman has used words which free the arbitrator from the delicate task of allocating the loss to the various causes which, in combination, may be responsible for it. It can never be said, when economic causes have lowered wages, that a reduction in earnings which follows on incapacity is not causally connected with it, for the workman can always reply: "If I were fully capable of work I might be earning 'more.'" On the other hand, if it be shown that the workman has not tried to get more remunerative work, the employer is entitled to say that no nexus exists between incapacity and earnings, and the workman has no reply to make. The principle, then, appears to me to be that the words "which 'he is earning'" refer only to earnings which are, at least in some degree, affected by the workman's incapacity. If I am right as to this, it follows that, as a general rule, a man whose earnings are reduced because he has been called up for service in His Majesty's army cannot properly claim that his soldier's pay and allowances shall be treated as his earnings for the purposes of the sub-section. They represent a figure which is wholly irrelevant to the calculation thereby prescribed. The reduction in his income is due, not to his incapacity, but to the fact that the legislature has made him (in common with all other young men) liable for military duty.

Mr. Paull preferred to put the case for the workman on a comparatively narrow ground. The arbitrator has found that, if the man had been able to do the same work which he was doing before the accident, he would probably not have been called up, although, it may be observed, he would still have been liable to be called up. Accepting this as a finding of fact, I do not think that it assists the workman's case. It is

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obvious that it was not because of his incapacity that he was called up for service. One must, indeed, suppose that his incapacity lessened the chances in favour of his being called up. The most that can be said is that, by reason of his incapacity, he took work which did not, by its nature, protect him from being called up, and, if this be granted, it is, in my opinion, none the less true that his incapacity in no way affects the amount which he is receiving as pay. It is not suggested that, if he suffered from no incapacity, his pay would be any higher than it is. On the contrary, he draws the ordinary pay and allowances of a gunner. In his case, therefore, incapacity and earnings are wholly unrelated.

I have assumed in this judgment, but do not intend to decide, that, if a sufficient nexus were shown between incapacity and reduced income, army pay and allowances could properly be regarded as "the amount which he [the workman] is "earning." It was conceded by the employers that they could be so regarded, and, for my own part, I think that this view may well be right, but it does not seem to me to be necessary for this court to express any final opinion on the point.

Appeal allowed.

Solicitors for employers: *Botterell & Roche, for Llewellyn & Hann, Cardiff.*

Solicitors for workman: *John T. Lewis & Woods, for Randell, Saunders & Randell, Swansea.*

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Fixtures—Machines not attached to freehold—Attachment to motors fixed to freehold.

Printing machines, weighing from 9 to 12 tons, stood on the floor of a factory, stable and secure by their own weight. They were driven by electric motors which were attached to them and were also attached to the freehold:—

Held, that the printing machines were not attached to the freehold, and, therefore, did not pass to the mortgagee on a mortgage of the freehold.

Northern Press and Engineering Co. v. Shepherd (1908) 52 S. J. 715, followed.

ACTION tried by Birkett J.

By an agreement made in February, 1935, Greycaine, Ltd., who were printers and bookbinders, hired from the plaintiff six printing machines, it being provided that the company should pay 18*l.* a week for the use of the machines and have an option to buy them. At the date of the agreement the company had issued a series of 100 first mortgage debentures of 1000*l.* each secured by a trust deed dated July 8, 1929, the Century Insurance Co., Ltd., being trustee. On November 16, 1934, the company issued further debentures, the second trust deed incorporating all the provisions of the first, the Friends Provident and Century Life Office being trustee. The existence of these debentures was unknown to the plaintiff at all material times, and he made no search or inquiry to ascertain whether there were any debentures or similar charges. By cl. 5 of the trust deed the company charged by way of legal mortgage certain freehold premises on which the printing business of the company was carried on and the fixed engines and plant and machinery and fixtures in and about the same with the payment to the trustees of all principal, interest and other moneys secured by the deed. The six machines in question were on these premises. They were not fixed to the floor or any part of the building in any way. They weighed from 9 to 12 tons, and stood on the floor, stable and secure by their own weight. They were driven by electricity, each being driven by a separate driving belt and motor. The driving apparatus was fixed to the freehold, and portions of the driving apparatus were attached to the machines. The driving apparatus could easily be detached from the machines, and the machines could be dismantled and removed without unbolting the motors from the floor. On November 20, 1936, interest on the debentures was 30 days in arrear, and, under cl. 10 of the trust deed, the defendant was appointed as receiver by the trustee. He took possession on November 21, 1936. In December, 1936, he refused to allow the removal of the machines, alleging that they were part of the freehold. The plaintiff now claimed their delivery up, or payment of their value, and damages for their detention. The defendants contended that the machines had lost their chattel character and had become attached to the freehold, and that they were, therefore, entitled to withhold possession of them from the plaintiff.

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Valentine Holmes for plaintiff.

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G. O. Slade and Michael Bowles for defendant.

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Cur. adv. vult.

1942. Nov. 20. BIRKETT J. read a judgment in which he stated the facts and continued : The question which I have to decide is whether these six printing machines were "fixtures" on November 21, 1936. Many authorities were cited to me in the course of the case, but for the reasons I shall give it is happily not necessary for me to discuss them in any detail.

In *Reynolds v. Ashby & Son* (1) the machines were fixed to concrete beds in the floor by means of bolts and nuts, and could have been removed without injury to the building or beds. The court held that the machines passed by the mortgage to the mortgagee. The cases were reviewed, and Lord Lindley said : (2) "My lords, I do not profess to be able to "reconcile all the cases on fixtures, still less all that has been "said about them. In dealing with them attention must be "paid not only to the nature of the thing and to the mode of "attachment, but to the circumstances under which it was "attached, the purpose to be served, and last but not least to "the position of the rival claimants to the things in dispute." Lord Lindley then discusses *Lyon & Co. v. London City and Midland Bank* (3), to which my attention was also called, where chairs screwed to bars fastened to the floor of a place of public entertainment in Brighton were held to be chattels and not to pass with the property mortgaged.

From the examination of many cases it would seem that the definition cited from the introduction to Adkin and Bowen on Fixtures, at p. xxxvii., and adopted by Mr. Slade, conveys the essential matters : "A fixture is an article which, by its "annexation to the land, has lost its chattel nature and has "become, in the eye of the law, part and parcel of the realty." To make these printing machines in this case fixtures, therefore, they must be annexed to the realty, and, in deciding whether annexation has taken place, physical attachment is only one of the considerations to be kept in mind. An article which is not physically attached to the land may yet in certain circumstances have become part and parcel of the land and have lost its chattel character. The question of annexation depends on a number of circumstances, and the cases show that each

(1) [1904] A. C. 466.

(3) [1903] 2 K. B. 135.

(2) Ibid. 473, 474.

case must be considered and decided on its own circumstances, applying the principles of law which have been laid down.

In *Leigh v. Taylor* (1) certain tapestries affixed by the tenant for life for purposes of ornament were held not to pass with the freehold to the remainderman. Lord Macnaghten said (2): "The question is still as it always was, has the thing in controversy become parcel of the freehold? To determine that question you must have regard to all the circumstances of the particular case The mode of annexation is only one of the circumstances of the case, and not always the most important—and its relative importance is probably not what it was in ruder or simpler times." In *Hobson v. Gorringe* (3), where a gas engine affixed to the ground by bolts and screws to prevent it from rocking was held to be a fixture, A. L. Smith L.J., in a considered judgment, reviewed all the principal cases up to that time, and in *Pole-Carew v. Western Counties and General Manure Co., Ltd.* (4) the Court of Appeal made a still later review.

From a consideration of these cases it would seem that, although there may be some cases where an article has some degree of physical attachment and yet does not become a fixture, the annexation of a chattel to realty depends mainly on its attachment to the soil or to something attached to the soil, such as a building. In *Holland v. Hodgson* (5) certain looms in a worsted mill were attached to the stone floors by nails, and it was held that they passed on a mortgage of the mill as part of the realty. Lord Blackburn said (6): "Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel."

It is said on behalf of the defendants in the present case that, although these printing machines are not physically

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(1) [1902] A. C. 157.

(2) *Ibid.* 162.

(3) [1897] 1 Ch. 182.

(4) [1920] 2 Ch. 97.

(5) (1872) L. R. 7 C. P. 328.

(6) *Ibid.* 335.

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attached to the land in any way, they are attached to certain other things which are themselves directly attached to the land. These other things are said to be the conduit tubing, the push button controls, the motors, and the guards over the driving belt gear. These things, no doubt, in 1935 were themselves chattels, but in 1936, it is said, they had become annexed to the realty and formed a part of it, and, the printing machines having been physically attached to those things, in all the circumstances the machines in 1936 themselves were part of the realty.

After the present case had been in progress for some time the researches of counsel for the defendants produced an important case which had not been referred to in the better known cases which followed it. It is *Northern Press and Engineering Co. v. Shepherd* (1), a decision of Eve J. The facts bear an astonishing resemblance to the present facts, and it has been of the greatest help to me in the decision of the present case. In that case Eve J. said (1): "Alexander & Shepheard (*sic*), Ltd., were the owners of certain leasehold premises upon which they carried on the business of printers and publishers, and these premises they mortgaged to the defendant. They subsequently entered into an agreement with the plaintiffs for the hire-purchase of the machine in dispute. The effect of that agreement was that, if the instalments were duly paid, the machine would become the property of Alexander & Shepheard, Ltd., and until they were all paid the property in the machine remained in the plaintiffs. Unfortunately the instalments were not all paid, and the defendant as mortgagee took possession of the premises. The plaintiffs thereupon claimed the machine on the ground that it was a chattel and not attached to the freehold. The defendant did not accept that position, and asserted that the machine was a fixture. The question, therefore, was whether the machine was a fixture or a chattel. It was said that it was a fixture because it was a composite machine, and the [hire-purchase] agreement comprised the fixed driving mechanism as well as the patented machine, and the driving apparatus was admittedly affixed to the freehold. But I think I should be introducing a dangerous principle if I were to hold that because a machine is worked by fixed mechanism therefore the machine is a fixture. I must have regard to the nature of the machine.

(1) (1908) 52 S. J. 715.

"It is complete in itself for the purpose for which it was designed, and I cannot hold that any part of the driving mechanism is part of the machine itself. Then it is said that there are direct and indirect attachments. But it is established by the evidence that not one of the direct attachments really operates to assist the machine in discharging its functions or is necessary for its stability. With regard to the indirect attachment to the motive power, if I were to hold that that constituted a fixture, then every motive power would be a connexion which would change a chattel into a fixture. I should be giving too much importance to the connecting link if I were to hold that it altered the character of the machine. I hold, therefore, that the machine is a chattel and belongs to the plaintiffs." Many of those observations apply with great force to the facts of the present case, and, therefore, I hold that these printing machines never lost their chattel nature, that they were not fixtures and were not comprised in the mortgage, and that the defendants had no right to withhold possession of them from the plaintiff. There will, therefore, be judgment for the plaintiff.

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Judgment for plaintiff.

Solicitors for plaintiff : *Murray, Hutchins & Co.*

Solicitor for defendants : *J. Shera Atkinson.*

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REX v. VAN PELZ.

C. C. A.

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Criminal law—Evidence—Character—Police evidence after conviction—Duty of counsel.

Dec. 1.

When a police officer is called to give evidence about a prisoner who has been convicted but on whom sentence has not been passed, he should in general limit himself to such matters as the previous convictions, if any, and the antecedents of the prisoner, including anything which has been ascertained about his home and upbringing in cases where the age of the prisoner makes that information material. It is the duty of the police officer to inform the court also of any matters, whether or not the subject of charges which are to be taken into consideration, which he believes are not disputed by the prisoner and ought to be known by the court. Police officers should inform the court of anything in the prisoner's favour which is known to the police, such as periods of employment and of good conduct.

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It is the duty of counsel for the prosecution to see that a police witness, when speaking on all these matters, is kept in hand, and is not allowed, much less invited, to make allegations which are incapable of proof and which he has reason to think will be denied by the prisoner.

APPLICATION for leave to appeal against sentence.

The applicant, Maureen Pearle van Pelz, was convicted before the recorder at the Central Criminal Court of larceny and was sentenced to fifteen months' imprisonment. After her conviction and before sentence a police officer gave evidence and stated the age of the applicant, and the main details of her life for some ten or twelve years. He said: "For many years past this woman has led a loose and an "immoral life, and she has associated constantly with "convicted thieves in the west end of London. On her arrest "she described herself as a property owner, but that is not "the case." Then he went on to make some statements about the way in which she made profits out of dealing with property. He continued: "She is very well known "indeed as a prostitute who frequents the west end of London "with a view to contacting men with money, and her "activities in this direction have exercised the mind of the "police for a considerable time past. I have in my possession "a letter which was written in April of this year to the Law "Land Co., who are the owners of Harley House, and the "writer alleges that shortly before writing this letter he met "this woman at the May Fair Hotel, and after a number of "drinks and entertaining her to dinner she suggested that "he should return with her to her flat for drinks. He was "there for two hours, during which time he says that he was "under the impression a man was on the premises. Immedi- "ately after leaving he found that a sum of 60*l.* was missing "from his wallet. This woman is undoubtedly an adventuress. "She is regarded as a very dangerous woman indeed. She "is completely unscrupulous, and for many years past she "has lived entirely on her wits."

Flowers K.C. and *Curtis-Bennett* for the applicant.
Vernon Gattie for the Crown.

The judgment of the court (VISCOUNT CALDECOTE C.J., WROTTESELEY and TUCKER JJ.) was delivered by
VISCOUNT CALDECOTE C.J. In our view, fifteen months'

imprisonment was a very proper sentence in this case, and one with which it is impossible for us to interfere, but questions have been raised as to statements made by a police officer about the character and activities of the applicant. Mr. Gattie has submitted that the first part of the statement made by the police officer after the conviction of the applicant was unobjectionable, but he agrees that the latter part, particularly the sentences dealing with the alleged offence, and describing the applicant as a very dangerous woman, and so on, ought not to have been given by the police officer. If we had reason to believe that the recorder sentenced the applicant on the basis that those statements were true, the court would have had to consider whether the sentence should be reduced, but it seems plain that he passed sentence without giving effect to the statements of the police officer. Therefore, the only question with which we must deal has regard to the propriety of police officers who are called in such circumstances making general statements about other offences and character.

The matter was recently before this court in *Rex v. Burton* (1) where Humphreys J. in giving the judgment of the court, referred to what he called some very improper evidence which a police officer employed by a railway company had given. The evidence was to this effect: "The police inquiries have proved definitely that the prisoner Burton has been responsible for the losses which have taken place owing to stealing on the railway." Humphreys J. went on to say: "In our opinion, that was a most improper statement to make. Either the police could prove that statement, in which case they ought to have prosecuted the appellant, or at least have given him an opportunity of asking for those offences to be taken into consideration, or they could not, in which case they ought not to have invited the presiding judge to increase the appellant's sentence in respect of felonies with which he had never been charged, and therefore had never had an opportunity of disproving." For many years past, the police have had the advantage of a judgment of Lord Alverstone C.J. in *Rex v. Campbell* (2), where he said: "For many years it has been known that after the conviction of a prisoner it is the duty of some responsible officer of police to tell the court what he knows about the prisoner as the

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(1) (1941) 28 Cr. App. R. 89. (2) (1911) 6 Cr. App. R. 131, 132;
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"result of inquiry, where it would involve great difficulty and
"expense to prove the facts by legal evidence. . . . At
"times, no doubt, police officers on these occasions say more
"than they ought to say against prisoners; but there is
"nothing to shew that that occurred in this case."

The question which has exercised the minds of the court is an important one. Police officers are nearly always called, after conviction, to assist the court when it is considering the sentence to be passed on a convicted person. We think that in this case we should enlarge a little on what Lord Alverstone C.J. said in *Rex v. Campbell* (1) and what Humphreys J. said in *Rex v. Burton* (2). When a police officer is called to give evidence about a prisoner who has been convicted, he should in general limit himself to such matters as the previous convictions, if any, and the antecedents of the prisoner, including anything which has been ascertained about his home and upbringing in cases where the age of the prisoner makes this information material. It is the duty of the police officer, we think, to inform the court also of any matters, whether or not the subject of charges which are to be taken into consideration, which he believes are not disputed by the prisoner and ought to be known by the court. Police officers should inform the court of anything in the prisoner's favour which is known to the police, such as periods of employment and of good conduct. We have no reason to believe that this is contrary to the present practice of the police who constantly inform the court of matters which are in the prisoner's favour. We also think that it is the duty of counsel for the prosecution to see that a police witness, when speaking on all these matters, is kept in hand, and is not allowed, much less invited, to make allegations which are incapable of proof and which he has reason to think will be denied by the prisoner.

It must not be taken that we are attempting to lay down a rule in such wide, and, at the same time, such exact, terms as would cover every case. That would be impossible, but it is hoped that these observations may be some guide to the right practice. The only other observation I need to make is that nothing I have said is intended to affect in the least degree the right of the court to inquire into any matter on which the court itself thinks it right to ask for information.

(1) 6 Cr. App. R. 131, 132; [1911] W. N. 47.

(2) 28 Cr. App. R. 89.

Applying these observations to the present case, it is the opinion of the court that the police officer went further than he should. In the view, however, which we take as to the effect of these improper statements on the mind of the court in passing the sentence, we do not think it right to interfere with it, and, therefore, the application for leave to appeal will be refused.

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Application refused.

Solicitor for applicant : *Registrar of Court of Criminal Appeal.*

Solicitor for Crown : *Director of Public Prosecutions.*

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POLPEN SHIPPING COMPANY, LIMITED *v.*
COMMERCIAL UNION ASSURANCE COMPANY,
LIMITED.

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Dec. 7, 8.

Insurance (Marine)—Institute Time Clauses—Risk of loss by collision between insured vessel and any other ship or vessel—Collision between insured vessel and flying boat.

A time policy of insurance on the plaintiffs' motor vessel, *P.*, to which the Institute Time Clauses were attached, covered a loss by collision between the *P.* and "any other ship or vessel." During the life of the policy the *P.* dragged her anchor and collided with and damaged a flying boat belonging to His Majesty which also was at anchor. The plaintiffs, having paid for the damage to the flying boat, claimed from underwriters their proportion of that sum :—

Held, that a flying boat was not a "ship or vessel" within the meaning of the policy and the plaintiffs' claim must fail.

A "ship" or "vessel" is a hollow structure intended to be used in navigation, that is, to do its real work on the seas or other waters, and capable of free and ordered movement thereon from one place to another.

ACTION tried by Atkinson J., without a jury.

The plaintiffs, the Polpen Shipping Co., Ltd., were the holders of a time policy of insurance on their motor vessel, *Polperro*, which was underwritten by the defendants, the Commercial Union Assurance Co., Ltd. Attached to the policy were the Institute Time Clauses, by cl. 1 of which it was agreed "that

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"if the ship hereby insured shall come into collision with any other ship or vessel and the assured shall in consequence thereof become liable to pay, and shall pay, by way of damages . . . any sum or sums in respect of such collision, the underwriters will pay the assured such proportion of such sum or sums so paid as their respective subscriptions hereto bear to the value of the ship hereby insured" On January 4, 1939, during the life of the policy, the *Polperro*, which was at anchor in harbour, dragged her anchor and came into collision with one of His Majesty's flying boats, described as the "X," which also was at anchor. Two letters were treated at the trial as evidence of the facts set out in them. A letter of October 21, 1942, stated that the flying boat was a London reconnaissance flying boat, fitted with two engines which, but for the accident, would have been engaged in fleet exercises. She was designed to carry a crew of six, and had a normal range of seven hundred miles and a maximum range of eleven hundred miles. It stated that a seaplane did not travel on the surface of the water, except when taking off or alighting. Later, further information was given: "The hull of the flying boat is constructed on the usual boat lines, with bulkheads, frames, stringers and shell-plating of light alloy. It has a length of 52 ft. 8 ins." By a later letter, this information was added: "The London flying boat is not amphibious. It is designed to take off from and alight on the water only. So far as can be ascertained a crew of six is usually employed, though the flying boat could be flown with less than six." The plaintiffs admitted liability for the collision and paid 2263*l.* to the Air Ministry for the damage to the "X" and also a sum for interest and costs. They sued the defendants for 202*l.* 9*s.* 10*d.* as the defendants' proportion of a loss under the policy. The defendants denied liability, on the ground (inter alia) that a flying boat was not a "ship or vessel" within the meaning of cl. 1.

Sir Robert Aske K.C. and *Devlin* for the plaintiffs. The flying boat, "X," was a "ship or vessel" within the meaning of the policy. If it had not been furnished with wings there can be no doubt that it would have been a vessel. The definition of "ship" in s. 742 of the Merchant Shipping Act, 1894, is that it "includes every description of vessel used in navigation not propelled by oars." The evidence shows that this boat was navigated about the harbour, sometimes for

half-an-hour at a time. Navigability is the deciding factor : *Merchants' Marine Insurance Co., Ltd. v. North of England Protecting and Indemnity Association* (1). A hopper barge, though having no means of self-propulsion, was held to be a "ship" within the meaning of s. 458 of the Merchant Shipping Act, 1854 : *The Mac* (2). The "X" was a "ship or vessel," and the mere fact that it was also able to fly makes no difference.

Pritt K.C. and *A. J. Hodgson* for the defendants. The clause in the policy as to collision with another "ship or vessel" must be interpreted as another ship or vessel ejusdem generis as the *Polperro*, which this flying boat was not. No doubt, in determining whether something is a ship or vessel, adaptability for navigation is important, but that means navigation as part of its ordinary use. Normally, this boat does not travel on water. It was built to fly, and only incidentally to navigate the water. An army tank which can navigate a river is not a vessel. In *Merchants' Marine Insurance Co., Ltd. v. North of England Protecting and Indemnity Association* (3), *Roche J.* agreed with the contention that a vessel was "an artificial structure made and "used for the conveyance by water of persons or property." That was not the object of the construction of this boat. The meaning of "ship" or "vessel" in the Merchant Shipping Act has nothing to do with the meaning of the words in this policy. On the other hand, the statutory provisions relating to aircraft show very clearly that, in the view of the legislature, aircraft (including seaplanes and flying boats) and "ships" or "vessels" are two distinct things. Absurd results would follow from holding that a flying boat is a ship, and the Merchant Shipping Acts would require to be considerably amended before they could be applied to a flying boat. The Air Navigation Act, 1920, by s. 11 provides that "the law "relating to wreck and to salvage of life or property, and to the "duty of rendering assistance to vessels in distress (including "the provisions of the Merchant Shipping Acts, 1894-1916, "and any other Act relating to those subjects) shall apply to "aircraft on or over the sea or tidal waters as it applies to "vessels." That provision would be quite unnecessary if a seaplane or flying boat was already a vessel. Further, by the Air Navigation Act, 1936, aircraft are for certain limited purposes to be "deemed to be" vessels : see s. 3, sub-ss. 1, 2. It is also important to notice that the last-named Act always

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(1) (1926) 26 Ll. L. Rep. 201.

(3) 25 Ll. L. Rep. 446; 26 Ll. L.

(2) (1882) 7 P. D. 126.

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speaks of aircraft "manœuvring" on the water and not "navigating": see s. 3, sub-s. 5 (c).

Devlin replied.

ATKINSON J. I am told that I have to give the words "ship or vessel" their natural and ordinary meaning, but probably it would be more accurate to say that I must give them the meaning intended by the parties to this policy. One naturally begins by turning to the Merchant Shipping Act, 1894, to see what definitions there are of these two words "vessel" and "ship." By s. 742 it is provided: "'Vessel' includes any 'ship or boat, or any other description of vessel used in navigation,' and "'ship' includes every description of vessel 'used in navigation not propelled by oars.'" It seems to me that the dominant idea is something which is "used in navigation," and not merely capable of navigating for the moment. The next guide which is presented to me is *The Gas Float Whitton No. 2* (1), where the plaintiffs were claiming to be entitled to a salvage award for services rendered to a gas float adrift in the tidal waters of the Humber. The facts are stated by Lord Esher as follows: "The lower part bore the 'resemblance of a ship or boat; that part called by the 'county court judge 'the hull' had two ends, shaped like the 'bows of a vessel; it was fifty feet long and twenty feet 'broad; it had no mast, sternpost, forepost, or rudder; its 'interior was wholly occupied by a cylinder into which gas 'was pumped so as to fill it, and so that the gas went up to a 'light elevated on a pyramid of pieces of wood fifty feet high. "The float could not, by reason of its structure, be used for 'any purpose of its being navigated. It could not be navigated. It could not carry any man or any goods from place 'to place. It could not hold any man in it except that he 'could by means of a man-hole and ladder ascend to the 'light at the top to clean or arrange it. The float was fixed 'by an anchor or anchors and otherwise at a particular spot 'in the River Humber, so as to remain always fixed at that 'spot," from where it had broken away. In the course of a very learned and long judgment Lord Esher said: "It seems 'impossible to say that within the ordinary English meaning 'among merchants or sailors or persons dealing with maritime 'affairs this thing could be called a ship, a vessel, or a boat. "But now we have to deal with the argument that the general

(1) [1896] P. 42, 45, 58, 60.

"law maritime acknowledged in the High Court of Admiralty included, and includes, subjects or objects as the subjects or objects of salvage which are beyond ship, apparel, and cargo, including flotsam, jetsam, and lagan, and wreck of ship or cargo. It was argued that everything found floating on the water, although it itself could not possibly be a navigable thing, might be the subject or object of salvage." Then he quotes with approval a passage from the case of *Nicholson v. Chapman* (1): "They are not vehicles intended for the navigation of the sea, or the arms of the sea; they are not recognized as instruments of commerce or navigation by any Act of Congress. They are piles of lumber, and nothing more, fastened together and placed upon the water until suitable vehicles are ready to receive them and transport them to their destined port." I am satisfied that the dominant idea in Lord Esher's mind in considering the attributes of a ship was not merely its ability to be navigated, but whether it could fairly be said to navigate the seas. *The Gas Float Whitton No. 2* (2) went to the House of Lords where Lord Herschell said (3): "It was not constructed for the purpose of being navigated or of conveying cargo or passengers." He seems to me to put his judgment in a nutshell when he says "for the purpose of being navigated." In *Merchants' Marine Insurance Co., Ltd. v. North of England Protecting and Indemnity Association* (4), the question was whether a pontoon crane was a ship or vessel, and Roche J. held that it was not. He said (5): "With regard to the decisions that have been cited to me, and the definitions derived from dictionaries which have been put before me very fully by Mr. Jowitt, I say that the adaption for navigation or to navigation is an ever-recurring element in the definitions in the dictionaries. It is indeed part of the definition adopted by Mr. Jowitt himself, which was that a vessel was an artificial structure made and used for the conveyance by water of persons or property." I think it is fair to say that again the dominating idea throughout his judgment was whether the structure which he was considering had been intended to be used for navigation. The same view was taken in the Court of Appeal. The court were singularly loth to lay down any principle or any definition. I doubt whether Scrutton L.J. was ever so hesitant about

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(1) (1793) 2 H. Bl. 254.

(4) 25 Ll. L. Rep. 446; 26 Ll. L.

(2) [1896] P. 42, 45, 58, 60.

Rep. 201.

(3) [1897] A. C. 337, 343.

(5) 25 Ll. L. Rep. 447.

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stepping in with some clarifying remarks, but I think it is clear that all the members of the court thought that a floating crane could not be regarded as being built to be "used in navigation." In the Scottish case of *Watson v. R. C. A. Victor Co., Inc.* (1) the question was whether a seaplane was a "ship or vessel" for the purposes of salvage. There is a passage in the Sheriff's judgment with which I agree, and I will read it: "On consideration of the question presented here for decision I am satisfied that the answer to it must be in the negative. It is common knowledge that a seaplane is in reality only a species of aircraft, and that although its construction permits of its floating on the sea, or even being navigated a short distance, its primary function—as illustrated in this case by the flight of the seaplane from New York to an island off the east coast of Greenland—is navigation in the air. Its construction for the purpose of floating or moving on the water is, I understand, mainly designed for purposes of safety should it be compelled through stress of weather or mechanical defect or for other reasons to descend from the air while flying above water." That, of course, is not true with regard to the flying boat with which I am concerned. Its construction is to enable it to land on water and to take off from water. The passage continues: "In short, in popular language, no one would I think describe a seaplane as a ship, or vessel, or boat. But further it is, I think, plain that a seaplane does not satisfy the definitions or descriptions of a ship or a vessel given in either the Merchant Shipping Acts or in the decided cases." Then the learned Sheriff gives the definitions which I have already read and adds: "The essential element in these definitions is that ships or vessels must be structures 'used in navigation.' Plainly it cannot be predicated of a seaplane—which as pointed out is a species of aircraft—that it is 'used in navigation' in the sense in which a vessel or a ship is so used."

My attention has been drawn to certain statutes. Mr. Pritt referred me to the Air Navigation Act, 1920, and urged on me the confusion which, in view of the provisions of that Act, would arise if a flying boat or a seaplane were to be deemed a "ship" or vessel." Section 11 of the Act deals with the law relating to wrecks and the salvaging of life or property in connexion with aircraft. If aircraft are "ships" or "vessels" are two sets of rules applicable to them? Section 12 provides for an

investigation into accidents arising out of air navigation. Are there to be two inquiries? The Air Navigation Act, 1936, contains provisions for the limitation of claims in respect of damage caused by aircraft which set up a standard altogether different from the limitation of liability under the Merchant Shipping Acts. Mr. Pritt points out that the two cannot work together. The Act of 1936 has one or two other sections which are of interest. By s. 3, sub-s. 2, it is provided: "For the purpose of the Dockyard Ports Regulation Act, 1865, "seaplanes when on the surface of the water shall be deemed "to be vessels." They are, therefore, only to be deemed to be vessels for a very limited purpose. Sect. 3, sub-s. 3, of the Act of 1936 is: "Any enactment which confers or imposes on a "conservancy or harbour authority any power or duty to make "bylaws for the regulation of ships or vessels shall be "construed as if the power or duty so conferred or imposed "included a power or duty to make bylaws for the regulation "of seaplanes when on the surface of the water." But for provisions of that sort harbour authorities would not have any power to make regulations governing seaplanes and flying boats on the basis of their being ships or vessels.

The conclusion at which I have arrived is that it is impossible to hold that the words "ship or vessel" in this policy include this flying boat. I do not want to attempt a definition, but if I had to define "ship or vessel" I should say that it was any hollow structure intended to be used in navigation, i.e., intended to do its real work on the seas or other waters, and capable of free and ordered movement thereon from one place to another. A flying boat's real work is to fly. It is constructed for that purpose, and its ability to float and navigate short distances is merely incidental to that work. To my mind, that is where the difference lies. There will be judgment for the defendants, with costs.

Judgment for defendants.

Solicitors for plaintiffs: *Holman, Fenwick & Willan.*

Solicitors for defendants: *Parker, Garrett & Co.*

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Dec. 10, 11.

ZURICH GENERAL ACCIDENT AND LIABILITY
INSURANCE COMPANY, LIMITED, THIRD PARTIES.

Practice—Third party—Insurance company—Joinder in action for personal injuries—Trial by judge alone.

The practice established by *Gowar v. Hales* [1928] 1 K. B. 191, and *Jones v. Birch Brothers, Ltd.* [1933] 2 K. B. 597, of not allowing a defendant's insurers to be made third parties in any action for personal injuries in a road accident when the action is tried before a jury has no application when the action is tried by a judge without a jury.

Quaere, whether, in view of the observations of Greer L.J. in *Carpenter v. Ebbblewhite* [1939] 1 K. B. 347, 359, the practice should be treated as still applicable to trials by jury.

Observation by Slesser L.J. in *Carpenter v. Ebbblewhite* [1939] 1 K. B. at p. 362, dissented from.

APPEAL from Croom-Johnson J.

On September 22, 1941, the plaintiff, Frederick William Harman, was standing on a pavement in Derby when he was struck and injured by boxes of fruit falling from a passing lorry which belonged to the defendant company, A. W. Robey, Ltd., and was driven by their servant, the defendant, Thomas Edward Crilly. On July 3, 1942, the plaintiff began proceedings in the Derby district registry against both defendants for damages for negligence. The defendant Crilly did not file a defence, but the defendant company, by their defence, denied that they or their servant were guilty of negligence. Both the defendants obtained leave to issue third party notices against the Zurich General Accident and Liability Insurance Company, Ltd., by whom they claimed to be indemnified under a policy dated February 1, 1939, which had been issued in respect of the lorry to Arthur Robey who afterwards transferred his business, together with the lorry, to the defendant company. The policy contained a *Scott v. Avery* (1) arbitration clause. The question between the defendants and the insurance company was whether, in view of what happened after the transfer of the business and the lorry in the matter of the payment of premiums by the defendant company and their acceptance by the insurance company, the policy was to be treated as available to the defendants. On October 13, 1942, the district registrar dismissed the insurance company's application to

(1) (1856) 5 H. L. C. 811.

have the third-party notices set aside and Croom-Johnson J. refused to reverse that order. The insurance company appealed.

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Samuels K.C. and F. W. Wallace for the insurance company. It is contrary to the established and invariable practice to allow the defendant in an accident case to make his insurance company third parties: *Gowar v. Hales* (1); *Carpenter v. Ebbelwhite* (2). The reason for the institution of that practice was that it was thought that the jury's knowledge that the defendant was insured was likely to prejudice the trial of the action, but in *Carpenter v. Ebbelwhite* (2), Slessor L.J. treated it as applying also in a trial by a judge alone. In *Lothian v. Epworth Press* (3), special considerations applied and that case has never been followed. Here there is no common issue affecting the plaintiff's claim against the defendants and the defendants' against the third party. Further, the insurance policy contained an arbitration clause. [LORD GREENE M.R. The issue whether the defendants are entitled to the benefit of the insurance policy cannot be affected by the arbitration clause.] It is very inconvenient to decide that issue by third-party proceedings, for it is one with which the plaintiff is in no way concerned. [They also referred to *Jones v. Birch Brothers, Ltd.* (4).]

Percy Lamb for the defendants was not called on to argue.

LORD GREENE M.R. The grounds of the application to set aside the third-party notices were three. One of them was based on the *Scott v. Avery* (5) clause and has not been seriously pressed on us. That argument cannot be maintained. The issue whether the insurance company are bound at all is one which cannot be decided otherwise than by action. It was also argued that it would be highly inconvenient to decide the issue between the defendants and the insurance company by third-party proceedings because it is an issue with which the plaintiff is not concerned, and it may involve unnecessary expense on the third parties in attending the trial of an action in which they disclaim any interest. That is a matter which can be safeguarded by taking proper directions as to the method of trial, and I can see no reason for interfering with

(1) [1928] 1 K. B. 191.

(4) [1933] 2 K. B. 597.

(2) [1939] 1 K. B. 347.

(5) 5 H. L. C. 811.

(3) [1928] 1 K. B. 199n.

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the discretion which has been exercised by the learned judge.

The substantial point urged before us was that, if the insurance company are brought into the action between the plaintiff and the defendants, the fair trial of that action will be liable to be prejudiced because it will be brought to the mind of the judge that the defendants are, or may be, entitled to the benefit of a contract of insurance. It is said also that the judge, in deciding the question whether or not there is a binding contract of insurance, may be affected by the consideration that, if he does not so find, the plaintiff may be without effective remedy. I must protest against the idea that judges are liable to have their minds prejudiced by considerations of that kind. The issues between the several parties in this litigation are distinct, and it is the duty of the judge not to allow the result of his decision on one issue to affect his mind in considering his decision on the other issue.

It is, however, said that there is an invariable practice to refuse to entertain third-party procedure against an insurance company, for reasons which are stated in several authorities. It is perfectly true that it has been said in this court more than once that where there is to be a trial by jury the bringing in of an insurance company by a third-party notice is to be discountenanced as making useless the rule of conduct recognized by the bench, that in a trial before a jury the jury must not be allowed to know that a policy of insurance is in existence. The case where that principle is laid down in the clearest way is *Gowar v. Hales* (1), in which Scrutton L.J. explained the reason for the practice. It is based, according to the language of the learned lord justice, entirely on the fact that a jury is liable to be prejudiced (and experience had shown that this liability was a real one) if it knows of the existence of a policy of insurance. *Lothian v. Epworth Press* (2), as stated in *Gowar v. Hales* (1) was a case of special circumstances, but it is to be observed that there the third-party procedure was accepted by the court and no objection to its acceptance was suggested on the ground that the jury might be prejudiced. Atkin L.J., in his judgment, said clearly that, *prima facie*, an insurance company can be brought in by a third-party notice. I do not attach any particular importance to that case as qualifying the rule stated by Scrutton L.J. In *Carpenter v. Ebbelwhite* (3), the plaintiff joined the insurance

(1) [1928] 1 K. B. 191.

(3) [1939] 1 K. B. 347.

(2) [1928] 1 K. B. 199n.

company as defendants to the action, claiming against them a declaration of liability. That procedure, on the face of it, was obviously wrong, because it is not the practice of the court to grant declarations in the air in respect of controversies which have not yet arisen, and the judgments of Greer and MacKinnon L.JJ. were based on that ground. It was argued as one reason for striking out the claim against the insurance company, that its presence in the action would be liable to prejudice the jury on the issue between the plaintiff and the main defendant. That argument was raised, but Greer and MacKinnon L.JJ. did not accept it. Greer L.J., in his judgment (1), referring to the presence of insurance companies in an action for personal injuries where the main defendant is insured, said: "With regard to the point which was made "by Mr. Samuels on behalf of the respondent that the joining "of the insurance company in the action is embarrassing because "it would be necessarily unavoidable that the jury would "know that there could not be any claim against the insurance "company unless they decided the case in favour of the "plaintiffs, that reasoning does not appeal to me, because "since the time when it has been provided by statute that "every owner of a motor-car must be insured, that matter "would be present to the minds of the jury just as much, "though not a word was said about it, as if it was proclaimed "from the housetops."

It is, therefore, clear that, in the view of Greer L.J., even in the case of juries, the old practice is now out of date and the reason for it has disappeared. In the present case we need not consider what may happen if and when actions of this character are again tried with juries. In the present circumstances the action will be tried by a judge alone. Subject to the judgment of Slesser L.J. in *Carpenter v. Ebbelwhite* (2), the question, even in the case of juries, is, to say the least of it, an open one, and no judge has ever suggested that when the trial is to be before a judge alone the principle derived from jury trials would apply. As I say, I protest against the imputation that a precaution intended for juries is required in the case of a judge sitting alone.

In *Carpenter v. Ebbelwhite* (2) Slesser L.J. based his judgment, not on the ground which Greer L.J. thought right, namely that a declaration was not a form of relief which could be claimed in the action, but on the ground that the presence of

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(1) [1939] 1 K. B. 347, 359. (2) [1939] 1 K. B. 347.

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the insurance company as defendants would be calculated to embarrass or prejudice a fair trial. He referred to the decision of this court in *Gowar v. Hales* (1) and the later case of *Jones v. Birch Brothers, Ltd.* (2), where Scrutton L.J. reasserted the principles he had laid down in *Gowar's* case (1), and he said that that case indicated that "the practice there referred to "has been a universal practice in dealing with this class of "case and one which, as I read his judgment [Scrutton L.J.'s "judgment] is not necessarily limited to cases where there is "a jury." I have carefully read the language of Scrutton L.J. in both those cases, and, with all respect to Slessor L.J.'s opinion, I can find nothing in it to suggest that the principle which he was upholding was one which applied to any cases other than those where there was a jury. Slessor L.J. makes this further observation (3): "Mr. Trapnell at one stage in "the argument said he was willing, in order that this claim "for a declaration should proceed, to abandon any claim to a "jury, for the reasons I have given. Though the result of "that would not be as objectionable as if there were a jury, "I think, nevertheless, the objection would not be altogether "removed. I think that Or. XIX., r. 27, is of general application "with regard to third-party procedure."

With all respect, I cannot agree with those observations. As I have said, I do not express any opinion on what may be the proper practice if and when jury trials in this class of action are resumed, but it is quite obvious that the weighty observations of Greer L.J. will have to be considered. In the present case, where there is no question of a trial by jury, I can see no possible reason for suggesting that the presence of the insurance company as a third party will be calculated to embarrass or prejudice the fair trial of the action. In the result, I find no ground on which we should be justified in differing from the view taken by the learned judge, and this appeal must be dismissed, with costs.

GODDARD L.J. I agree. Like my Lord, I cannot agree with the views which Slessor L.J. expressed in *Carpenter v. Ebbelwhite* (3). *Gowar v. Hales* (1) did not lay down any rule of law. It laid down a rule of practice based on considerations which existed in 1927 when that case was tried, but which took on an entirely different aspect after the Road

(1) [1928] 1 K. B. 191.

(3) [1939] 1 K. B. 347, 362.

(2) [1933] 2 K. B. 597.

Traffic Act, 1939, came into force. In any event, *Gowar v. Hales* (1) was not a case of a trial before a judge alone, and I have always thought that the remarks of Greer L.J. in *Carpenter v. Ebbelwhite* (2) had very great force. It is not necessary, as the Master of the Rolls has said, that we should to-day express a final view on the question whether the rule in *Gowar v. Hales* (1) should prevail where there is a trial by a jury. I would point out that the headnote in *Carpenter v. Ebbelwhite* (2) might mislead, because it concludes with the words "*Gowar v. Hales* (1) and *Jones v. Birch Brothers, Ltd.* (3) "held applicable." If that means that these cases were held applicable by Slesser L.J. there is nothing to be said, but it looks as if the whole court had held that they were applicable to the facts in *Carpenter v. Ebbelwhite* (2). I think that is wrong, and that while Slesser L.J. put his judgment on that basis, Greer L.J. did not, and I think that Scrutton L.J.'s remarks, fairly read, indicate that he agreed with Greer L.J. and not with Slesser L.J. Most judges who have to try these cases know whether or not an insurance company is concerned and it is impossible to suppose that they allow their minds to be affected by their knowledge. It seems to me that the question whether or not there is a contract of indemnity should be tried in the same proceedings as the action in which the liability of the defendants will be determined. There is no ground for saying this third-party notice is in any way embarrassing or would lead to anything but a fair trial of the action. I agree that the appeal should be dismissed.

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Appeal dismissed.

Solicitors: *A. E. Wyeth & Co.*; *G. A. Hathway, for Flint, Bishop and Barnett, Derby.*

(1) [1928] 1 K. B. 191.

(3) [1933] 2 K. B. 597.

(2) [1939] 1 K. B. 347, 362.

H. C. G.

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REX v. LARKIN.

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Dec. 15.

Criminal law—Trial—Jury—Capital charge—Recommendation to mercy—Suggestion by judge—Unequivocal verdict—Questions by judge to jury.

In directing a jury on a capital charge, no suggestion should be made by the judge that, in the event of their finding the prisoner guilty, it is within their province to recommend him to mercy, since, unless such a recommendation is the spontaneous act of the jury, it will be of no assistance to the authorities whose duty it is to advise His Majesty whether or not sentence of death should be carried out.

Although in the case of any inconsistency or ambiguity in the verdict of a jury proper questions may be put to them by the judge to ascertain the meaning of their finding, no questions should be put to them to ascertain the grounds of their verdict if the verdict is plain and unequivocal and unambiguous in its terms.

APPEAL against conviction and sentence.

The appellant, Henry Larkin, was indicted before Oliver J. at Liverpool Assizes for the murder of a woman by cutting her throat with a razor. In the course of his summing-up Oliver J. said: "If the evidence drives you to the conclusion that in law this was a murder—a deliberate killing without sufficient excuse to reduce it to manslaughter—it is, as you know, within your province, if you so choose, to give a recommendation to mercy." Later, Oliver J. said: "If you think this was a voluntary act and not an accident, was there enough provocation to reduce the thing to manslaughter? If you think there was not, as I have already told you, you will have to return a verdict of murder, but you can say in the circumstances: 'We recommend him to mercy.'" The jury returned an unqualified verdict of manslaughter. Oliver J. then addressed the following questions to the foreman of the jury whose answers are appended: "Did you come to the conclusion that this woman accidentally fell on the razor?"—"We did, Sir." "It was an accident?" "That was the reason?"—"Yes, it was an accident. We have come to the conclusion that we can find no evidence to prove that it was murder." Oliver J. then said: "It is not a question of murder. I said that, if it was done deliberately, it was not murder if, in your view, there was provocation,

Reported by Philip P. Durnford, Esq., Barrister-at-Law.

"and whether you thought it was provocation or whether you thought it was an accident the verdict would be manslaughter just the same. I do not know whether you did come to any conclusion about it or not, whether it was an accident or whether it was provocation. In either case, your verdict is valid. I want to know for my own purposes whether you did come to the conclusion that it was an accident or provocation?" The foreman: "Provocation." The appellant was sentenced to five years' penal servitude. One ground of his appeal was that Oliver J. misconstrued the verdict of the jury in that he wrongly failed to accept their statement that they found that the woman had met her death accidentally.

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Miss Heilbron for the appellant. The verdict of the jury, as explained by their answers to the questions put to them, was inconsistent and cannot stand. The death of the woman could not be attributable both to an accident and to the provocation which the appellant had received since provocation would pre-suppose intent and negative accident.

Fitzwalter Butler for the Crown.

The judgment of the court (VISCOUNT CALDECOTE C.J., HUMPHREYS and ASQUITH JJ.) was delivered by HUMPHREYS J. who, after dealing with the other grounds of appeal, said: It is difficult to understand what is aimed at by the appellant's last ground of appeal. Of course, if the verdict of the jury had been inconsistent, it could not stand, but their verdict of manslaughter was plain, unequivocal and unambiguous and it was accepted by everybody and recorded. When the jury had returned that verdict, their function was ended, but the judge, as he said, for his own purposes—no doubt to assist him on the question of sentence—asked them in effect what was the ground on which they had reduced the crime from murder to manslaughter. That reduction might have been made on one of two grounds. There was evidence of provocation, and the jury might have accepted the evidence of the appellant that he had had no intention of injuring the woman. The first question put by the judge to the foreman of the jury was: "Did you come to the conclusion that this woman accidentally fell on the razor?" In the opinion of the court that was a most undesirable question. It was addressed to the foreman of the jury and there was no indication

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on the part of the judge that he wished the jury as a body to answer the question. In fact, it was answered by the foreman apparently without consultation with his colleagues. [HUMPHREYS J. read the further questions which were put to the foreman and the answers returned by him, and continued :] It is perfectly plain that no one was suggesting that the verdict should be altered or that the jury were being asked to return any verdict other than that which they had returned. No better illustration could be found of the undesirability of a judge, who has accepted what he regards as a proper verdict of a jury in a criminal case, inviting them to explain what they meant by their verdict. In this country we consider that a jury is the best possible tribunal yet devised for deciding whether or not a man is guilty, and, subject to the direction in law of the judge, of what offence he is guilty, but no one has ever suggested that a jury is composed of persons who are likely at a moment's notice to be able to give a logical explanation of how and why they arrived at their verdict. That was really what the judge was inviting the jury to do in the present case. In addition, as I have said, the judge put the questions to the foreman of the jury and accepted from him answers with which, perhaps, the other eleven members of the jury did not agree. The unhappy result was that the foreman, who was, no doubt, thoroughly confused, gave two totally inconsistent answers. The court deprecates questions being put to a jury on the meaning of a verdict which they have returned unless the verdict is inconsistent or ambiguous, in which case proper questions may be put by a judge inviting the jury to explain what they mean. Where, however, the verdict returned is plain and unambiguous, it is most undesirable that the jury should be asked any questions about it. In the opinion of the court the incident which occurred in this case is of no importance from the point of view of an appeal against the conviction of the appellant. It happened after the trial was over so far as the jury were concerned, and, if it had any effect, it must have been on the sentence which was afterwards passed on the appellant.

There is another matter to which the court wishes to refer. Twice in the course of his direction to the jury, Oliver J. reminded them that, in the event of their finding the appellant guilty of murder, it was within their province to recommend him to mercy. Although the matter could not affect an appeal against either conviction or sentence, the court desires

to say that it strongly deprecates any reference by a judge, when trying a capital case, to the privilege of the jury to make a recommendation of any kind. A jury frequently asks the judge whether they may add a rider to their verdict, and, on the judge being satisfied that the rider is a proper one, leave is given. When such a rider takes the form of a recommendation to mercy in a capital case, it may be of great value to the authorities who have the duty of advising His Majesty whether or not the sentence should be carried out, but if that recommendation comes, not as the spontaneous act of the jury, but because they are asked by the judge whether they would like to recommend the prisoner to mercy, it loses its whole force and probably has no effect on the mind of any person who considers the case. It ceases to be the act of the jury, since it would indeed be a strange jury which, on being asked in a murder case if they would like to make a recommendation to mercy, refused to add to their verdict those words which express the desire common to every human being, that mercy should be shown. Another great objection to the practice, if it be a practice, with which I have been dealing, is that it has always been impressed on juries by judges, particularly when trying a capital case, that they are not concerned with the consequences of their verdict and judges have frequently reprimanded counsel who have referred to such a matter as a recommendation to mercy. If, however, judges are to make a practice of referring to the consequences of a verdict of guilty in a capital case, it is difficult to see why counsel for the defence should not have the same right, and if counsel for the defence, then counsel for the prosecution, and so a trial for murder might resolve itself into an undignified and undesirable squabble whether or not, in the opinion of the jury, the capital sentence ought to be carried out. The court hopes that the practice with which I have been dealing will not be followed in future. [The court dismissed the appeals against both conviction and sentence.]

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Appeals dismissed.

Solicitors for appellant : *John A. Behn, Twyford & Reece, Liverpool.*

Solicitor for Crown : *Director of Public Prosecutions.*

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Dec. 17, 18.

Emergency legislation—War damage—Application by landlord to determine validity of notice of disclaimer—Subsequent applications by tenant to determine fitness of premises—Matters of unfitness open to tenant—Scope of implied statutory covenant—Amalgamation of premises held under separate leases—Landlord and Tenant (War Damage) Act, 1939 (2 & 3 Geo. 6, c. 72), s. 6, sub-s. 1; s. 11, sub-s. 1 (a)—Landlord and Tenant (War Damage) (Amendment) Act, 1941 (4 & 5 Geo. 6, c. 41), s. 14.

Different parts of a building were held by tenants, who used the whole for the purposes of their business, under three separate leases from the same landlord. Two leases related to parts of the ground floor, and the third to the upper floors. The building was damaged by enemy action and the landlord executed certain repairs. The tenants, being dissatisfied, served three notices of disclaimer of the leases under s. 4 of the Landlord and Tenant (War Damage) Act, 1939, and the landlord made three applications to the county court under s. 6, sub-s. 1, of the Act, to determine whether the notices of disclaimer were of no effect on the ground that the premises were not unfit. The county court judge found in the tenants' favour in respect of one matter, affecting the ground floor only, and against them on other matters alleged, but, treating the different parts of the building as one, he found the whole unfit by reason of the defect to the ground floor. The landlord served three notices to avoid disclaimer under s. 4, sub-s. 5, of the Act, and, in compliance with the implied covenant contained in s. 11, sub-s. 1 (a), of the Act, he remedied the defect and gave notice to the tenants that the premises were fit and that rent would run as from a certain date. The tenants then made three applications to the county court under s. 14 of the Landlord and Tenant (War Damage) (Amendment) Act, 1941, alleging that the premises were still unfit by reason—(a) of the matters already alleged and decided against them on the landlord's applications under s. 6, sub-s. 1; (b) of the landlord's failure to repair certain tenants' and trade fixtures; (c) of a new structural defect, not previously alleged. The county court judge held—(a) that the tenants were not entitled to litigate again the matters already decided against them; (b) that the covenant contained in s. 11, sub-s. 1 (a), did not extend to tenants' and trade fixtures; (c) that, in fact, the alleged structural defect did not render the premises unfit. He found, however, in the tenants' favour on a defect not pleaded by them which emerged for the first time in the evidence of the landlord's surveyor. It affected the upper floors only, but treating the different parts of the building as before, as a whole, he found the entire premises unfit on the ground of that defect. The landlord appealed.

Held, (1.) that the county court judge was right in holding that

the tenants were not entitled to litigate again the matters decided in the proceedings under s. 6, sub-s. 1, of the Act of 1939, but that those proceedings did not estop the tenants from relying, in their own proceedings under s. 14 of the Act of 1941, on any elements of unfitness on which they did not rely in the earlier proceedings, even though they knew of them at that time; (2.) that, although the new point was not open to the tenants on their particulars, the judge was entitled to allow them to raise it, if he thought fit, and he must be assumed to have done so; and that he was entitled to take into consideration any matter down to the date of his judgment. When, however, a court had declared that premises were fit as from a certain date, they were fit for the purposes of the Acts from that date, and that position could not be altered by something discovered after judgment. (*Quære*, whether, if damage due to a latent defect resulting from war damage appeared later, the tenant could serve a new notice of disclaimer); (3.) that the implied covenant contained in s. 11, sub-s. 1 (a), was unqualified, and the landlord did not discharge it by making the premises "as fit as he could reasonably be expected to make them, having regard to the defects which he could reasonably be expected to discover," if they were not rendered fit in fact; (4.) that the covenant did not extend to tenants' and trade fixtures; and (5.) that land held under separate leases could not be amalgamated for the purposes of the Acts, even though the premises were used as one, and the land comprised in one lease might be useless to the tenants without the land comprised in the other. The landlord's appeals, therefore, succeeded as to the ground floor leases, which were not affected by the unfitness of the upper floors, as to which the appeal failed.

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APPEAL from Lambeth County Court.

The landlord, Abraham Louis Oppenheim, was the owner of the reversion expectant on the determination of three leases vested in the tenants, Wallis & Co. (Costumiers), Ltd. The three leases related respectively to (1.) the ground floor of 161 Rye Lane, Peckham, (2.) the ground floor of 161a Rye Lane, and (3.) the two upper floors of both premises. In December, 1940, the building suffered damage through enemy action. The landlord did certain repairs, but the tenants were not satisfied, and on August 14, 1941, they served three notices of disclaimer under s. 4, sub-s. 2 (a), of the Landlord and Tenant (War Damage) Act, 1939. On September 12, 1941, the landlord issued three applications under s. 6, sub-s. 1, of the Act (1), asking the court to determine whether

(1) By Landlord and Tenant (War Damage) Act, 1939, s. 6, sub-s. 1: "Where a notice of disclaimer is served . . . (b) any	" person having an interest in the " reversion immediately expectant on the determination of " that lease; may, at any time
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the notices of disclaimer were of no effect on the ground that the premises were not unfit at the time when the notices were served. On November 24, 1941, the judge decided against the tenants with regard to the two upper floors, but in their favour with regard to the ground floor because the window space which the landlord had provided was insufficient. Treating the subject-matter of the three leases as one whole, he found all the premises unfit on that ground. The landlord was granted an extension of time in which to serve notices to avoid disclaimer, and on December 12, 1941, he served three such notices. The effect of those notices was that under s. 11, sub-s. 1, of the Act the notices of disclaimer became of no effect but the landlord became bound by the statutory covenant to render the premises fit contained in para. (a) of that subsection. He repaired the only matter found against him, namely, the lack of light, completing the work on January 6, 1942, and notifying the tenants that the premises were ready and that rent would run from that date. The tenants inspected the premises, and made no complaints, but they did not pay the rent due on March 25. On May 4, the landlord issued a writ in the High Court for the rent, and on May 18 the tenants made three applications in the county court under s. 14 of the Landlord and Tenant (War Damage) (Amendment) Act, 1941, to determine whether the premises had been rendered fit. In pursuance of an order for particulars they alleged unfitness in a number of respects which

" within one month from the
" service of the notice, apply to
" the court to determine whether
" the notice is of no effect on the
" ground that the land comprised
" in the lease was not unfit by
" reason of war damage at the
" time when the notice was
" served."

By s. 11, sub-s. 1: " Where a
" notice to avoid disclaimer is
" served in respect of a notice of
" disclaimer the notice of dis-
" claimer shall be of no effect,
" and . . . the lease to which
" it relates shall have effect
" subject to the following modifi-
" cations:—(a) There shall be
" implied in the lease . . . a
" covenant by the landlord with

" the tenant that the land com-
" prised in the lease shall be
" rendered fit as soon as is reason-
" ably practicable after the service
" of the notice to avoid disclaimer."

By Landlord and Tenant (War Damage) (Amendment) Act, 1941, s. 14: " Where—(a) the land
" comprised in any lease has been
" rendered unfit by war damage
" and . . . a notice to avoid
" disclaimer has been served in
" respect of the lease; and (b)
" repairs have been carried out to
" the land; either the landlord
" or the tenant may apply to the
" court to determine whether the
" land has been rendered fit, and, if
" so, the date on which it was
" rendered fit."

fell into three groups ; (1.) matters already alleged and decided against them on the landlord's applications under s. 6, sub-s. 1, of the Act of 1939 ; (2.) defects in certain fittings and fixtures put up by the tenants and admittedly removable by them, and certain electric fittings ; (3.) a new complaint of a structural defect in a beam between the ceiling of the first floor and the floor of the second floor. The county court judge held (1.) that it was not open to the tenants to litigate again the matters which had been decided against them on the previous application by the landlord ; (2.) that the tenants' fixtures did not fall within the statutory covenant contained in s. 11, sub-s. 1 (a) ; and (3.) that the alleged structural defect did not in fact, make the premises unfit. On all their pleaded particulars, therefore, the tenants failed. In the evidence of the landlord's surveyor, however, it was disclosed for the first time that a small area of plaster on the ceiling of the first floor was insecure and that it was not improbable that the state of this plaster was due to war damage. The tenants sought to rely on this new element of unfitness, and on it the judge found in their favour, and treating, as before, the three sets of demised premises as one, he held that the premises as a whole were unfit, and that the landlord had not fulfilled the statutory covenant to render them fit. The landlord appealed in all three cases.

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Denning K.C. and *Done* for the landlord. The Acts of 1939 and 1941 are framed on the basis that each lease is a separate unit and must be considered separately. The county court judge was, therefore, wrong in holding that unfitness, if any, in the upper floors rendered the whole premises unfit. The alleged defect in the plaster was discovered after the hearing of the landlord's applications under s. 6, sub-s. 1, of the Act of 1939, and after the landlord had remedied the only item of war damage then found to exist and had given notice to the tenant that the premises were fit. The definition of "unfit" in s. 24 of the Act of 1939 shows that regard must be had to "the material time," that is, to the time at which the matter has to be considered by the parties, and to "all other circumstances" which include the circumstance that the tenants never complained of the plaster at the material time. Nor was the defect in the plaster pleaded by the tenants in their applications under s. 14 of the Act of 1941. They are, therefore, estopped by their conduct from raising

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that matter now. Moreover, all questions relating to the fitness of the premises were *res judicata* in the first proceedings, and the tenants are estopped from relying now on any defect which was then ascertainable by reasonable examination. If they did not choose to discover and prove in the first proceedings all reasonably discoverable defects they thereby waived them and they cannot set them up in the present proceedings: see *Henderson v. Henderson* (1). The tenants are only entitled in these proceedings to prove (and the burden is on them) matters which could not with reasonable diligence have been ascertained at the earlier date: see *Phosphate Sewage Co. v. Molleson* (2). The county court judge found that the defect in the plaster was not ascertainable earlier. The landlord had, therefore, remedied all ascertainable defects, and the land was rendered fit within the meaning of the implied covenant contained in s. 11, sub-s. 1 (a). To "render fit" is not a high standard. It is a lesser obligation than to "reinstate": see *Boudou v. Thornton-Smith* (3) and s. 5 of the Act of 1941. A similar situation will arise in all cases where the court declares under s. 14 of the Act of 1941 that the land has been rendered fit, for it decides on evidence which is necessarily limited to defects then ascertainable. In all such cases the rent begins to run before the latent defect is discovered. On its subsequent discovery the tenant's remedy may be to serve a fresh notice of disclaimer. Alternatively, it may be that once rent has begun to run again the implication of the covenant in s. 11, sub-s. 1 (a) of the Act of 1939 can no longer be treated as a condition precedent to liability for rent, but only as an independent covenant. If the landlord were bound to remedy defects which were not ascertainable, it would offend against the maxim *lex non cogit ad impossibilia*. It would mean that, if the land had been rendered fit so far as anyone could tell and remained so for months, the tenant could put forward a fresh defect, theretofore latent, and escape rent for the intervening period. In those circumstances a good tenant who had paid the rent would be in a worse position than a bad tenant who had not. Could he recover the rent paid in the interim? The obligation on the landlord under s. 11, sub-s. 1 (a), is the same as that on the tenant under s. 10, sub-s. 1 (a), and the tenant could not, under s. 10, sub-s. 1 (b), put forward latent defects subsequently discovered

(1) (1843) 3 Hare 100, 114.

(3) [1941] 1 K. B. 561, 565.

(2) (1879) 4 App. Cas. 801, 814.

as a defence to an action for the rent. If he could, the landlord would have no protection. [LORD GREENE M.R. The landlord could apply to the court under s. 14 of the Act of 1941 for a declaration that the land had been rendered fit, or he could ask the tenant to agree that the land had been rendered fit.] That would not afford him a protection where the defect was not ascertainable by reasonable examination. As to the tenants' fixtures the county court judge was right. The covenant contained in s. 11, sub-s. 1 (a), has no application to such things.

Monier-Williams, for the tenants, was only called on to argue whether the three leases should have been considered separately, and whether the implied covenant contained in s. 11, sub-s. 1 (a), extended to tenants' fixtures and trade fittings. On the first question: The premises were rightly treated as one. The ground floor premises were used in close and essential association with the rooms on the upper floors without which the ground floor would have been useless. As to the fixtures and fittings: If trade fixtures and fittings are essential to the user of the premises, the landlord's implied covenant contained in s. 11, sub-s. 1 (a), must cover such fixtures and fittings even if they are the property of the tenants and removable by them. They are affixed to the freehold, and, if not removed by the tenants before the expiration of the term, would become the property of the landlord, the tenants' right being a mere right of removal. In fact, these leases excluded the tenants' fixtures and trade fittings from their covenant to repair.

LORD GREENE M.R. It is questionable whether it was open to the tenants, having regard to their particulars, to rely on the evidence of the defect in the plaster. It was, however, competent to the judge to allow that matter to be relied on, and I think that he must be taken impliedly to have granted the indulgence because he took that defect into consideration, apparently without objection from the Bar. He found that the looseness of the plaster was due to war damage, and that it rendered the premises unfit. In my opinion, there was evidence to support his finding, and it must stand. It was, however, strenuously argued that this defect could not constitute a matter of unfitness because it was not apparent to anyone, the tenant had never complained of it, and it was only discovered by accident two

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C. A. days before the hearing. It was said that the implied covenant
1942 contained in s. 11, sub-s. 1 (a), of the Act of 1939 was complied
WALLIS with as soon as the landlord had put right all matters of unfitness
& Co. which he could reasonably be expected to discover. In my
(COSTUM- opinion, that construction is too narrow. It seems to me that,
IERS) as the covenant is to render the premises fit, it means what
v. it says, and there is no justification for writing into it a qualifica-
OPPENHEIM. tion, such as "or as fit as the landlord can reasonably be
Lord Greene "expected to make it, having regard to the defects which he
M.R. "can reasonably be expected to discover." The county court
judge is entitled to take into account, subject to questions
of amendment, costs, and so forth, any matters which are
brought to his notice down to the date of his judgment, but
when, having heard all the admissible evidence, he decides
that the premises were made fit as from a particular date,
fit they then were for the purposes of the Act, and that
circumstance cannot be altered by something discovered
afterwards. Whether or not a subsequent discovery of some
hidden defect due to war damage would entitle the tenant to
serve another notice of disclaimer or take some other steps,
I do not know. It is not necessary to decide that, and I
express no opinion on it. So far as these proceedings are
concerned, the judge, if he allowed this point to be taken,
was entitled to give effect to it, and to find, as he did, that
the existence of the defect in the plaster prevented the land-
lord's statutory covenant from being fulfilled.

The result, so far as I have gone, is that the landlord fails,
but it was urged further that the tenants were estopped from
relying on that defect by the previous proceedings by the
landlord under s. 6, sub-s. 1. It was said that it was obligatory
on the tenants to bring forward in those proceedings all
matters of unfitness of which they could avail themselves at
that time, and that in the subsequent proceedings under
s. 14 they were precluded from relying on any matter of
unfitness which they might have brought forward in the earlier
proceedings and did not. In my opinion, that argument is
misconceived. In the proceedings under s. 6, sub-s. 1, of
the Act of 1939 the landlord alleged that the tenants' notices
of disclaimer were invalid because the premises were not unfit
at the time when the notices were served. That application
by the landlord could be effectively dealt with by the tenants
by proof of one single element of unfitness. It was sufficient
for the tenants to put before the court facts sufficient to uphold

the notices, and one fact alone would suffice, but in their present applications under s. 14 of the Act of 1941 the tenants are taking on themselves the burden of showing that the premises have not been rendered fit, and it seems to me that they are entitled to rely on every matter of unfitness of which they know even though it was not brought forward in the previous proceedings under s. 6, sub-s. 1. The alternative would be that the tenants would be bound at their peril to bring forward in proceedings under s. 6, sub-s. 1, every possible item of unfitness to support the validity of their notices, even though one would be sufficient for their purpose. They might, for instance, have to incur great expense in getting a survey of a whole building when it would be quite sufficient for them to call a witness to prove that the roof was falling in and nothing more. The issues raised in applications under s. 6, sub-s. 1, and s. 14 are different, and the facts necessary to deal with them are by no means necessarily the same, and it cannot be said that the tenants are precluded from raising in proceedings under s. 14 matters which they might have raised in earlier proceedings under s. 6, sub-s. 1, if they had chosen to do so and had had the requisite knowledge. In my opinion, there is no estoppel here by reason of the proceedings under s. 6, sub-s. 1, except as to the matters actually raised and decided against the tenants in those proceedings, which the judge rightly held that they were not entitled to litigate again.

On the question of the fittings and fixtures, Mr. Monier-Williams argued that the failure to replace (because they had disappeared) the partitions and the electric fixtures constituted a failure by the landlord to perform the implied covenant contained in s. 11, sub-s. 1 (a). The county court judge did not accept that view. He did not, apparently, consider the question of fact whether the disappearance of these articles was due to war damage. He held as a matter of law that tenants' and trade fixtures, removable by the tenant at any time, do not fall within the scope of the landlord's statutory covenant. In my opinion, he was right in so deciding. The word used in the Act of 1939 is "land," and "land" is defined in s. 24 of that Act as "land of any tenure, and includes any "buildings or works situated on, over or under land." The damage with which the Act is concerned is damage to land, as so defined, comprised in a lease. The implied covenant contained in s. 11, sub-s. 1 (a), is a covenant that the land

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comprised in the lease shall be rendered fit. It seems to me that, read in the light of its definition and of the mischief which the Act was obviously intended to remedy, the word "land" cannot be construed as covering what are generally called tenants' or trade fixtures which are removable by the tenant during the term, much less mere chattels which are not, in the strict sense, fixtures at all. To hold the contrary would lead to the most extravagant results. It would mean that, if the land comprised in the original lease was a factory and the tenant had installed machinery worth, perhaps, hundreds of thousands of pounds which he was entitled to remove at the end of his term, the landlord would be under an obligation to restore the whole of that machinery before he could demand a penny of rent. The machinery, although technically in law affixed to the freehold so long as it remains there, is, for all business purposes, the tenant's property. If it is destroyed, the loss is his. It has nothing to do in any practical sense with the landlord, and I cannot conceive why the legislature should have gone out of its way to impose on the landlord an obligation to repair and reinstate—and, perhaps, entirely to replace—trade fixtures. In my opinion, the county court judge construed the Acts correctly in this respect, and the point based on alleged unfitness through the landlord's failure to replace the fixtures fails.

That involves that the tenants are right in this appeal, subject to one point of considerable importance. The particular matter of unfitness found against the landlord was physically situated on the first floor, that is to say, in the land comprised in the lease of the first and second floors. It had nothing to do with the ground floor, which, by itself, is now perfectly fit. It was argued and accepted by the county court judge—indeed, he had taken the same view on the earlier proceedings under s. 6, sub-s. 1—that the three sets of demised premises must, for the purposes of the matter before him, be dealt with as one, and, therefore, that the defect on the first floor affected, not merely the premises comprised in the lease of the upper floors, but also those comprised in the leases of the ground floors, the reason, apparently, being that, owing to the lay-out of the premises as a whole and the way in which the tenants had chosen to use them, the ground floor was useless without the upper floors. In my opinion, there is no justification in the language of the Act for amalgamating separate leases in that way. The Act deals throughout with "land comprised

"in a lease." The obligation under the statutory covenant contained in s. 11, sub-s. 1 (a), is confined to "the land comprised in the lease," and the same language is used throughout the Act. The fact that a tenant for his own purposes has chosen to use premises comprised in one lease in business connexion with premises comprised in another lease seems to me to be a matter which does not affect the landlord. If there had been three separate landlords in this case it would have been impossible to suggest that the landlords of the ground floors, having done all they were bound to do in rendering those premises fit, could be kept out of their rent because the landlord of the upper floor failed in his obligations. It may well be that, where buildings have been so physically altered or arranged that one part cannot be used for business purposes without another, hardship will fall on the tenant, but is a landlord who has rendered his own land fit and then claims his rent to suffer the hardship of being deprived of his rent because another landlord has not chosen to put his land right? I find no justification in the Act for such a thing, and, in my opinion, the county court judge was wrong in dealing with the matter as he did.

The result, therefore, is that the appeal with regard to the first and second floors fails, but the two appeals with regard to the ground floor succeed for the reason that I have given, and the date as from which that floor is to be treated as fit must be the date asserted by the landlord, namely, January 6, 1941.

GODDARD L.J. I agree.

DU PARCQ L.J. I agree. When one looks at s. 14 it becomes clear that the question before the county court judge was whether the land comprised in each of these three leases had been rendered fit. It is impossible to say that the land comprised in any of the leases, except that relating to the particular part of the premises which received damage, had ever been rendered unfit. Mr. Monier-Williams argues that premises are rendered unfit within the meaning of these Acts if something happens to the next door premises which makes it impossible to use the premises which are themselves uninjured. I think that submission is quite inconsistent with s. 80 (the definition section) of the War Damage Act, 1941, because damage in the sense which Mr. Monier-Williams suggests is

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C. A. clearly not the direct result of action taken by the enemy or
1942 of the other matters mentioned in that definition. I, therefore,
agree that the appeals succeed to the extent indicated by the
Master of the Rolls.

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*Appeals allowed with regard to ground floor ;
dismissed as to upper floors.*

Solicitors for landlord : *Ernest W. Long & Co.*

Solicitors for tenants : *Teff & Teff.*

J. W. H.

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SIMON v. ISLINGTON BOROUGH COUNCIL AND ANOTHER.

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Nov. 3, 4, 5 ;
Dec. 10.

*Local government—Tramway—Abandonment of track by undertakers—
Assumption by highway authority of work of removing track and
making good surface of road—Delay in executing work—Accident to
cyclist—Liability of authority—London Passenger Transport Act,
1933 (23 Geo. 5, c. 14), s. 23.*

On September 23, 1938, the London Passenger Transport Board gave notice to the appropriate highway authority under s. 23, sub-s. 2, of the London Passenger Transport Act, 1933, of their proposal to abandon a tramway, and on November 9, 1938, the highway authority gave notice under s. 23, sub-s. 5, of the Act that they proposed themselves to take up, remove and dispose of the tramway equipment and to make good the surface of the road. The highway authority had not done this by April 2, 1941, when a bicyclist met with a fatal accident which was due to the dangerous condition of the abandoned tramway by reason of a rail and the adjoining stone setts not being level with each other. In an action brought by the administrator of the bicyclist against the highway authority :—

Held, that when the board's notice of abandonment had taken effect both the property in and the possession of the tramway equipment passed to the highway authority who thereupon became liable, either in negligence or in nuisance, if any part of that equipment was in a state of disrepair which resulted in injury to a member of the public ; that the highway authority was not protected by the doctrine of the immunity of a highway authority for non-feasance since (a) the action of the highway authority in allowing the tramway equipment to remain in the road was a positive and active step, if the equipment constituted a nuisance, to keep that nuisance in situ, which, in its essence, was the reverse of non-feasance, and (b) in any case, the immunity

did not extend to acts or defaults of a highway authority in connexion with any duties other than characteristic highway duties, such as the repair of the highway, and, in particular, did not extend to the relation of a highway authority to works constructed on the highway for other than highway purposes, by whomsoever placed there; and, therefore, that the action succeeded.

Skilton v. Epsom and Ewell U.D.C. [1937] 1 K. B. 112, and the principle enunciated by Blackburn J., in *White v. Hindley Local Board of Health* (1875) L. R. 10 Q. B. 219, 223, applied.

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APPEAL from Croom-Johnson J.

The plaintiff, Frank Ernest Simon, as the father and administrator of the deceased, Roy Andre Talbot Simon, sued the defendants, the Islington Borough Council and the London Passenger Transport Board, for damages under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934. On April 2, 1941, when the deceased was riding a pedal bicycle along the Caledonian Road, Islington, London, his machine skidded on the tramway track, he was thrown to the ground, and a trolley-bus belonging to the defendant board ran over him, causing injuries from which he died. The accident was due to the condition of the tramway track which had fallen into disrepair, the rails and the stone setts not being level with each other. The track had been taken over by the defendant board under the London Passenger Transport Act, 1933, but on September 23, 1938, they gave notice, under s. 23, sub-s. 2, of the Act (1) of abandonment of the tramway

(1) By London Passenger Transport Act, 1933, s. 23, sub-s. 1: "Subject to the provisions of this section, the board may abandon either in whole or in part any tramway forming part of their undertaking."

By sub-s. 2: "At least three months before the date on which any such abandonment is to take effect the board shall give notice of the proposed abandonment and the date upon which that abandonment is to take effect to the highway authority responsible for the road on or above which the tramway is laid or erected."

By sub-s. 5: "Within two months after receiving a notice

"of the proposed abandonment of
"a tramway or any part of a
"tramway, the highway authority
"may give notice to the board
"that they propose themselves to
"take up, remove and dispose of
"all or any of the tramway
"equipment, and to make good
"the surface of the road, and in
"that event the board shall . . .
"pay to the highway authority
"such sum as may be agreed, or
"in default of agreement as may
"be determined by arbitration to
"be equivalent to the cost which
"the board would have incurred
"in respect of their obligations
"under sub-ss. 3, 4 and 6 of this
"section . . . and the highway
"authority shall indemnify the

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to the defendant council as the highway authority for the district. On November 9, 1938, the defendant council gave notice to the board under s. 23, sub-s. 5, of the Act that they proposed themselves to take up, remove and dispose of the tramway equipment, and to make good the surface of the road. It was not disputed that thereafter the borough council became responsible for the removal of the track and the maintenance of the road. Croom-Johnson J. held (a) that the death of the deceased was caused solely by the defective condition of the tramway track and that there was no negligence on the part of the driver of the trolley-bus, and he, therefore, dismissed the claim as against the defendant board; (b) that the obligation to remove the tramway equipment and make good the surface of the road devolved on the defendant council as a highway authority, and their failure to fulfil that obligation was not misfeasance but non-feasance for the consequences of which, as a highway authority, they were not liable. The plaintiff appealed against the finding in favour of the defendant council.

Serjeant Sullivan K.C. and *A. E. Holdsworth* for the plaintiff. Immunity from liability for non-feasance is confined to the performance of duties which have descended to highway authorities as the successors of the inhabitants at large and the surveyors of highways. The doctrine embraces only the non-feasance of a highway authority in respect of its purely highway duties and does not apply to a breach by a highway authority of a statutory duty which does not fall strictly within that class. In the present case the neglect of the defendant council to remove the tramway equipment and make good the surface of the road was not non-feasance on their part as a highway authority. It was a breach of a duty cast on them by the Act of 1933. The defendant council, in proposing to

"board against all claims
 "and expenses in respect of or in
 "connection with such tramway
 "equipment or the removal thereof
 "or the making good of the
 "surface of the road and shall
 "with all reasonable dispatch
 "carry out the work as to which
 "such notice has been given."

"By sub-s. 7: "As from the
 "date on which abandonment by

"the board of any tramway or part
 "thereof takes effect, the board
 "shall cease to be charged with
 "any expenses incurred under,
 "and shall be relieved of any
 "liability arising by virtue of, any
 "statutory enactment relating to
 "the maintenance or repair of the
 "road by the persons working the
 "tramway or part thereof, as the
 "case may be."

remove the tramway equipment and make good the road, were really volunteers since they had an option either to remove the nuisance themselves or to leave the defendant board to do so. The duty under which the council were, after December 23, 1938, the date on which the board's notice of September 23 took effect, was self-imposed. *Skilton v. Epsom and Ewell U.D.C.* (1), where the placing of a traffic stud on a road was held not to be part of the maintenance of the highway under the Highways Act, 1835, and so the defendants, having failed to remedy a defect, could not claim immunity for non-feasance, is indistinguishable from the present case. [*Ingram v. London Passenger Transport Board* (2); *Borough of Bathurst v. Macpherson* (3); *McClelland v. Manchester Corporation* (4); *Browne v. De Luxe Car Services* (5) were also referred to.]

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Edgedale for the defendant council. Sect. 23, sub-s. 5, of the London Passenger Transport Act, 1933, imposes no liability on the highway authority except (a) the duty to remove the tramway track with all reasonable dispatch, and (b) the duty to indemnify the defendant board. The breach of duty (a) would not give a person damnified a right to sue the defendant council for damages, for a mere failure by a local authority to carry out a duty which, as here, is punishable on indictment for the misdemeanour of nuisance at common law, does not give a right of action in damages: *Cowley v. Newmarket Local Board* (6); *Saunders v. Holborn District Board of Works* (7); *Hesketh v. Birmingham Corporation* per Scrutton L.J. (8). Furthermore, the defendant council is not liable in respect of the accident to the deceased since the cause of that accident was not the failure of the council to remove the tramway equipment but the condition of that equipment before removal. As to duty (b), that only applies between the time of the giving of the notice by the defendant council and the date of the expiration of the three months' notice of abandonment given by the board. If that is not so, and, since sub-s. 7 only relieves the board from liability under statute, there is still after the expiration of the three months' notice given by the board, a liability on the board at common law for nuisance

(1) [1937] 1 K. B. 112.

(2) Unrep., Nov. 17, 1941.

(3) (1879) 4 App. Cas. 256, 262.

(4) [1912] 1 K. B. 118, 129.

(5) [1941] 1 K. B. 549.

(6) [1892] A. C. 345.

(7) [1895] 1 Q. B. 64.

(8) [1924] 1 K. B. 260, 271.

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 1942 that does not give a right of action to the plaintiff against the
 borough council. It is said that on abandonment the tramway
 became the property of the defendant council as highway
 authority, and that the council are liable for allowing a
 nuisance on the highway, but what occurred here is mere
 non-feasance for which the council are not liable: *Thompson v. Brighton Corporation* (1); *Short v. Hammersmith Corporation* (2); *Nash v. Rochford R.D.C.* (3); *East Suffolk Rivers Catchment Board v. Kent* (4). *Skilton v. Epsom and Ewell U.D.C.* (5) is not relevant because there the highway authority placed something in the road which caused the nuisance.

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Serjeant Sullivan, in reply, cited *Glossop v. Heston and Isleworth Local Board* (6); *Peebles v. Oswaldtwistle U.D.C.* (7); *Pasmore v. Oswaldtwistle U.D.C.* (8).

Cur. adv. vult.

1942. Dec. 10. SCOTT L.J. read the following judgment of the court (SCOTT, MACKINNON and GODDARD L.JJ.). This appeal from Croom-Johnson J. raises a question depending partly on the correct interpretation of the London Passenger Transport Board Act, 1933, and partly on the scope of the common law doctrine of the non-feasance immunity of a highway authority. Croom-Johnson J. held himself bound to follow a decision of Atkinson J. in *Ingram v. London Passenger Transport Board* (9), where that judge held that a highway authority sued in similar circumstances was protected from liability under the doctrine that a highway authority is liable only for misfeasance and not for non-feasance, his view being that that principle applied so as to confer immunity on a metropolitan borough council which had acquired from the board the possession and ownership of the physical assets, fixed in one of the council's roads, which had once formed part of a tramway undertaking and then been transferred to the board under its Act of 1933, and, subsequently, pursuant to s. 23 of that Act, "abandoned" by the board to the council. It is beyond dispute that the combined arrangement of tram-rails and adjoining setts, which in the present case also had

(1) [1894] 1 Q. B. 332.

(2) [1910] 104 L. T. 70.

(3) [1917] 1 K. B. 384.

(4) [1941] A. C. 74.

(5) [1937] 1 K. B. 112.

(6) (1878) 12 Ch. D. 102.

(7) [1897] 1 Q. B. 625.

(8) [1898] A. C. 387.

(9) Unrep., Nov. 17, 1941.

been the property of the London Passenger Transport Board and before it of the tramway promoters operating under the Tramways Act, 1870, was, at the time of the accident, in a dangerous condition of disrepair by reason of the rails and the setts not being level with each other, and that that condition was the cause of the accident. The sole question before us is as to the liability of the council. The legal problem can be brought out most clearly by analysing the legal position in steps.

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(1.) The duty of the tramway undertaking, from which the London Passenger Transport Board took over, had been, under s. 25 of the Act of 1870, to maintain the tramway "in such manner that the uppermost surface of the rail shall be on a level with the surface of the road," and, under s. 28, to maintain and keep in good condition and repair the setts on each side of the rails at that level.

(2.) A breach of that duty causing injury to a person lawfully on the highway was actionable as "statutory negligence," the phrase used by Lord Wright in *Lochgelly Iron and Coal Co., Ltd. v. M'Mullan* (1), and it entitled a person injured thereby to recover damages from the tramway company: see s. 55 of the Act of 1870, and compare *Dublin United Tramways Co., Ltd. v. Fitzgerald* (2). Alternatively, an action lay in respect of a dangerous condition of the tramway in the public road, causing damage to an individual, for nuisance at common law against the tramway company as owners and occupiers of the plant which gave rise to the nuisance. Even without s. 55 we think the position would have been the same.

(3.) The London Passenger Transport Act, 1933, by ss. 5 and 100, transferred to the board the various tramway undertakings mentioned in the second schedule and imposed on the board the above-mentioned duties in respect of the tramway equipment (*inter alia*) in the Islington area. Sect. 55 of the Tramways Act, 1870, is not one of the sections excepted from application to the London Passenger Transport Board by s. 100 of the Act of 1933.

(4.) As long as the board remained in occupation of the tramway equipment which they owned, they remained under those duties, including the statutory duties of maintenance under ss. 25 and 28 of the Tramways Act, 1870.

(5.) Although s. 41 of the Tramways Act, 1870, which contains a code about discontinuance of a tramway is not

(1) [1934] A. C. 1, 23.

(2) [1903] A. C. 99.

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among the sections of that Act which s. 100 of the board's Act says are not to apply to the board, s. 23 of the board's Act in effect supersedes it and is the only statutory provision about the discontinuance of the Islington tramway which we need consider. That section was, no doubt, framed expressly to provide simple machinery for bringing metropolitan tramways to an end, which was one of the objects for which the board was created by Parliament. It conferred on the board the right in its discretion at any time to give notice of abandonment of its tramway equipment in any area to the local highway authority "responsible for the road on or above "which the tramway is laid or erected": sub-ss. 1 and 2. By sub-s. 3 the board had the right, or, if the responsible highway authority required, the duty within a limited time to remove its equipment, and (sub-s. 4) make good the road. Sub-s. 5 is the important provision. Under it the highway authority was empowered within two months of the board's notice to give a counter-notice saying that they would do the removal, but at the expense of the board, save that they were to credit the board with the proceeds of sale of the tramway equipment taken over by them, and they were required to carry out the work with all reasonable dispatch. In the event of the highway authority exercising this option, the property in and possession of the equipment, in our opinion, would pass to that authority—i.e., in the present case to the defendant council—and the council would take it over in whatever condition it happened then to be.

(6.) Sub-s. 7 of s. 23 is in the following terms: "As from "the date on which abandonment by the board of any tramway "or part thereof takes effect, the board shall cease to be charged "with any expenses incurred under, and shall be relieved of "any liability arising by virtue of, any statutory enactment "relating to the maintenance or repair of the road by the "persons working the tramway or part thereof, as the case "may be." The phrase "any statutory enactment relating "to the maintenance or repair of the road" refers primarily to ss. 25 and 28 of the Act of 1870, but the sub-section is wide enough to cover also any common law liability, as for damages for a nuisance, which arises out of a failure to perform the duties of ss. 25 and 28. There is a little ambiguity in the language of the section about the date when the abandonment takes effect as contemplated by sub-s. 3. That sub-section makes it take effect on the expiration of the board's notice,

e.g., in three months. Sub-s. 5 relieves the board of their "obligations" under sub-ss. 3, 4 and 6 in respect of the road covered by the board's notice, presumably from the time the counter-notice is received. This relief is, we think, limited to those obligations, and does not of itself free the board from liabilities to third parties, and this interpretation seems to be borne out by the words of indemnity which follow. The complete release from liability given by sub-s. 7 should thus be construed as operating only from the expiration of the board's notice, but at that moment it should be contemplated as freeing the board from all liability to third parties arising directly or indirectly out of the plant laid by the tramway undertaking, and taken over by the board. *

(7.) The board gave its three months' notice of abandonment under s. 23 on September 23, 1938. On November 9, the council gave their counter-notice. The notice of abandonment, therefore, "took effect" within sub-s. 7 on December 24 of that year. From then onwards up to April 2, 1941, nothing whatever was done by anybody to see that the "tramway equipment" was maintained in a safe condition. Nothing was done by the board because they, no doubt, regarded all their liabilities, either under the statute or at common law, as ended by the abandonment, for the property in the equipment and the possession of it had passed from them. Nothing was done by the council, whether from want of thought or because they imagined they were immune as a highway authority under the doctrine of non-feasance does not appear. We were told that negotiations were proceeding in regard to other stretches of track both within and without their borough limits. The short fact is that nothing was done for the safety of the public.

Before delivery of the statement of claim the plaintiff's solicitors wrote to the solicitor to the council inquiring as to the position of the council under s. 23. The reply dated January 5, 1942, was as follows: "We have ascertained from our clients that responsibility for the removal of the tram track in Caledonian Road, including the maintenance thereof, was assumed as from December 24, 1938, and that after that date, the London Passenger Transport Board were no longer under any liability in respect of the maintenance, removal or re-instatement." December 24, 1938, be it observed, was the day on which the board's three months' notice of abandonment "took effect." In our opinion, the letter

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correctly states the council's legal position. Having regard to the great age of the equipment of many of the tramway undertakings in 1933 when transferred to the board and the notorious inconvenience and dangers incidental to the presence of the rails in the streets, it would have been an extraordinary omission, if Parliament had provided for the termination of the board's liability when its notice of abandonment took effect, without providing that the authority to which the tramway was "abandoned" should assume that liability. We say "extraordinary," because the conversion of tramways into trolley-bus systems, which was generally understood to be the intention of the Act of 1933, might involve years of delay, as, in fact, happened in Islington. In our opinion, Parliament has not so failed to provide, but, if there be any ambiguity in the language of the Act or any doubt left open, it ought to be resolved in favour of not defeating what must have been the intention of Parliament. After delivering the statement of claim, the plaintiff's advisers arranged for the consent of the council to an alternative claim being added by amendment to the statement of claim, namely, that the council's unreasonable delay in removing the rails and restoring the road was the cause of the fatal accident on which the action was based. We allowed the amendment, but, in our opinion, it is irrelevant. The cause of the accident was either negligence in regard to the state of disrepair or common law nuisance, not the delay in removal.

That the council did come under liability for such street accidents as that sued on is made clear by the following considerations. The physical things constituting the "tramway equipment" within the meaning of s. 23, sub-s. 3, of the Act of 1933, were originally inserted in the road under the powers of s. 26 of the Act of 1870. They remained foreign to the highway, though in the road, and remained in the legal possession, first, of the tramway promoters, and then of the board, to each of whom they in turn belonged. When they were abandoned to the council both property and possession passed to the council. If the state of disrepair of any part of them had constituted a nuisance the day before abandonment took effect, the board would have been liable. On what principle can it be argued that the day after it took effect, that same nuisance did not expose the council, which owned and possessed the things which constituted the nuisance, to the same liability?

In our opinion, the principle that a highway authority is not liable for non-feasance is wholly irrelevant. That immunity descended to it as the lineal successor, first, of the surveyor of highways, and, before him, of the inhabitants at large, but it must continue to be limited to those duties, incumbent on a modern local authority with highway functions which are owed by it as highway authority. In the present case the council stands in the shoes of the board for the sole purpose of removing the board's cast-off superfluities. If those things constituted a danger when taken over, or became dangerous by decay after transfer to the council, they were still foreign to the road as such, and due to be removed with reasonable dispatch. But for the council's counter-notice they would have been removed and the road made good by the board by the end of 1938 or thereabouts. It was the choice of the council that stopped the removal by the board. The council wanted for ulterior reasons to let the plant remain in the road until such time as it should suit the council's own convenience to remove it. In our opinion, that was a positive and active step taken by the council to keep the plant where it was, and, if it did constitute a nuisance, to keep the nuisance in situ. In its essence that was the reverse of non-feasance. But over and above that consideration there is a reason of a different kind for holding that the council fail to bring themselves within the rule of immunity to highway authorities. That immunity extends only to damage due solely to the non-repair of the road qua road. It does not extend to acts or defaults of the highway authority in connexion with any duties except characteristic highway duties such as that of repairing the road. It does not apply in connexion with public health duties, e.g., in connexion with sewers: see *White v. Hindley Local Board of Health* (1); nor with the duty of protecting the public from falling into an unfenced pit alongside the high road; nor with duties imposed by the Road Traffic Acts, 1930 and 1934. If such other duties have been undertaken by the body which is also the highway authority and ill-performed, then the highway authority may be sued by the person injured and the immunity doctrine is no defence. In *Skilton v. Epsom and Ewell U.D.C.* (2), the Court of Appeal, consisting of Slesser L.J., Romer L.J., and Swift J., had before them an action against a district council, which was, in fact, the highway authority, for damages for negligence

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(1) (1875) L. R. 10 Q. B. 219. (2) [1937] 1 K. B. 112.

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through a stud in the road, fixed by the defendant council under the Road Traffic Act, 1930, flying up and injuring the plaintiff on his bicycle. The stud was, in fact, negligently fixed. It was held that the council were not entitled to take refuge behind the doctrine of the immunity of a highway authority for non-feasance. A long string of cases was reviewed, and, except for the circumstance that the council there had themselves fixed the stud in the first place whereas in the present case the council took over the tram-rails and setts from the board, that case is on all fours with this. In our opinion, the one matter of difference between the two cases is immaterial, because in the present case the council took over something which was an artificial work, foreign to the roadway as such and inserted into it under the enabling powers of s. 26 of the Tramways Act, 1870. The council were concerned to remove it because, with the expiry of the board's tramway powers, the iron and stone, which had been a tramway, lost their identity and became incongruous foreign matter in a modern road and mere obstructions to traffic. They were no part of the road proper, and the duty of the council as highway authority was to treat them as obstructions to traffic, protect traffic from their dangers, and abate the nuisance as soon as they could. In the meantime, they took the risk of any injuries to members of the public using the road as a mere road. The capacity in which they were related to the obstructing metal and stones was that of highway authority owning a road in which a foreign substance had been inserted, and we cannot see any legal ground on which they were in any better position than if they had themselves put similar lengths of metal and blocks of granite in the surface of the road where, as road material, they had no place. The council were in no better position than if the board had gone into liquidation and the council had bought the old iron and granite from the liquidator, to remove it themselves and sell it at a profit.

Skilton v. Epsom and Ewell U.D.C. (1) is a decision, binding on us, to the effect that the relation of a highway authority to works constructed in a highway for other than highway purposes, by whomsoever placed there, is not one clothed with the immunity of the ancient highway authority known to English law. It is unnecessary to discuss the authorities which were reviewed in that case, but for the principle involved

see, particularly, *White v. Hindley Local Board of Health* per Blackburn J. (1). The appeal must be allowed with costs here and below, including all costs reserved, and judgment entered for the plaintiff for 450*l.* 1*s.*, the amount of damages provisionally fixed by the learned judge.

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Appeal allowed.

Solicitors for plaintiffs: *White & Co.*

Solicitor for defendant council: *W. C. Crocker.*

(1) L. R. 10 Q. B. 219, 223.

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MEADOW DAIRY COMPANY, LIMITED *v.* COTTLE.

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Nov. 24.

Emergency legislation—Lighting restrictions—Causing light to be displayed in "black-out"—Negligence of defendant's servant—Absence of knowledge and exercise of due diligence by defendant—Availability of defence—Defence (General) Regulations, 1939 (St. R. & O., 1939, No. 927), reg. 24 (2B)—Lighting (Restrictions) Order, 1940 (St. R. & O., 1940, No. 74), paras. 1 (a), 52 (4.).

A company was charged with causing a light to be displayed inside a roofed building during the hours of darkness so as to be visible from outside the premises, contrary to paras. 1 (a) and 52 (4.) of the Lighting (Restrictions) Order, 1940, which was made under reg. 24 (1.) of the Defence (General) Regulations, 1939. The contravention of the order was due to the negligence of a servant of the company which, as they could only act through agents, was the company's negligence, and it occurred without the knowledge of the company who, it was found, had exercised all due diligence to secure compliance with the order:—

Held that the company were charged under paras. 1 (a) and 52 (4.) of the order of 1940 in respect of the acts of their servant for which they were responsible and not as occupiers of the premises under reg. 24 (2B) of the Defence (General) Regulations, 1940; and that, therefore, the defence afforded by the proviso to the regulation was not available to them.

CASE stated by the deputy recorder of Bristol.

The respondent company, Meadow Dairy Co., Ltd., were convicted at Bristol police court of causing a light to be displayed inside a roofed building in such circumstances that

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it was visible from outside the building, contrary to paras. 1 (a) and 52 (4.) of the Lighting (Restrictions) Order, 1940, which were made under regs. 24 and 38 of the Defence (General) Regulations, 1939 (1). The conviction was quashed at quarter sessions.

The respondent company occupied business premises at 222 Church Road, St. George, Bristol. They provided proper "black-out" screens for use on the premises, and it was the duty of their manageress to ensure that these screens were properly fixed and to switch off all lights before she left the premises at night. On March 4, 1941, the manageress neglected this duty, with the result that light was displayed in the premises which was visible from outside them. The company had from time to time by circular letter admonished the manageress of the necessity of complying with the law as to lighting restrictions, and they maintained a regular inspection to ensure such compliance. The deputy recorder found as a fact that the company had no knowledge of the contravention of the order by the manageress, and had exercised all due diligence to secure compliance with the order. He, accordingly, held that the defence afforded by the proviso to reg. 24 (2B) of the Defence (General) Regulations, 1939, was available to the company, and he allowed their appeal and quashed the conviction. At the request of the appellant, Cottle, a superintendent of police, he stated this case for the opinion of the court.

(1) Defence (General) Regulations, 1939, reg. 24 (2B): "If any order made under this regulation is contravened or not complied with in the case of any premises . . . the occupier of the premises . . . shall be guilty of an offence against this regulation: Provided that, in any proceedings which by virtue of this paragraph are taken against any person in respect of a contravention of, or non-compliance with, such an order on the part of another person, it shall be a defence for the defendant to prove that the contravention occurred without his knowledge and that he exercised all due diligence to secure

"compliance with the order."

Lighting (Restrictions) Order, 1940, para. 1: "During the hours of darkness, it shall not be lawful —(a) for any light to be displayed inside any roofed building . . . in such circumstances that any illumination therefrom is visible from outside the building . . ."

Para. 52 (4.): "Without prejudice, in the case of premises . . . to the liability of the occupier of the premises . . . any provision of this order rendering unlawful the display of any light . . . shall be construed as including a specific provision that no person shall cause or permit that light to be displayed . . ."

Fitzwalter Butler (*Scott Henderson* with him) for the appellant. The defence afforded by the proviso to reg. 24 (2B) of the Defence (General) Regulations, 1939, is only available when proceedings are taken under that regulation against an occupier of premises. These proceedings were not taken under reg. 24 (2B) and the company were not charged as the occupiers of the premises. The proceedings were taken under paras. 1 (a) and 52 (4.) of the Lighting (Restrictions) Order, 1940, and the company were charged merely because the acts of the manageress, their servant, were their acts, as they could only act through agents.

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Cartwright Sharp K.C., *Cyril Williams* and *Lachs* for the company. The case falls under reg. 24 (2B) of the Defence (General) Regulations, 1939. The Lighting (Restrictions) Order, 1940, was made under reg. 24 (1.). It was contravened, and contravened "in the case of" the "premises" in question. The company are capable of themselves being guilty of a summary offence: see Interpretation Act, 1889, s. 2, sub-s. 1 (applied to the regulations and order by reg. 100 (6.) of the regulations); and they were the occupiers of the premises. They were sued as such, and, therefore, the defence afforded by the proviso is available to them.

Scott Henderson replied.

VISCOUNT CALDECOTE C.J. The respondents to this appeal are a company and the manageress was their servant. In my judgment, for the present purpose the manageress was the company, and the finding that she caused the light to be displayed was a finding that the company caused it to be displayed and by itself required a conviction to be recorded against the company. It is, however, suggested that the defence afforded by the proviso to reg. 24 (2B) of the Defence (General) Regulations, 1939, was available to the company, because the company were in fact the occupiers of the premises. I am satisfied, however, that these proceedings were not taken by virtue of reg. 24 (2B), but were under paras. 1 and 52 (4.) of the Lighting (Restrictions) Order, 1940, and were in respect of the acts of the manageress for which the company were responsible. The defence under the proviso to reg. 24 (2B) is available only if the proceedings are taken in virtue of that paragraph, and, therefore, it does not avail the company. The fallacy which underlies the opinion of the

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deputy recorder, with all respect to him, is that, merely because the company were the occupiers of the premises, the proceedings were taken under reg. 24 (2B). The appeal must be allowed and the case remitted to the deputy recorder with an intimation of our opinion.

TUCKER J. I agree. I am clearly of opinion that neither an individual nor a limited company charged under paras. 1 and 52 (4.) of the Lighting (Restrictions) Order, 1940, can take advantage of the defence afforded by the proviso to reg. 24 (2B).

Solicitor for appellant: *Town Clerk, Bristol.*

Solicitor for company: *Cooke, Painter, Spofforth & Co., Bristol.*

W. L. L. B.

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Nov. 24;
Dec. 2.

STEPNEY BOROUGH COUNCIL v. WOOLF.

Rates—Reduction of payment—Poverty of ratepayer—Damage to premises through enemy action—Resolution of rating authority to deal with damaged premises in uniform manner regardless of ratepayer's means—Rating and Valuation Act, 1925 (15 & 16 Geo. 5, c. 90), s. 2, sub-s. 4.

Emergency legislation—Exercise of remedy—Levying of distress—Non-payment of rates—Powers of justices—Courts (Emergency Powers) Act, 1939 (2 & 3 Geo. 6, c. 67), s. 1, sub-ss. 2 (a) (i.), 4.

In pursuance of a recommendation of the Minister of Health the appellant borough council resolved that the borough treasurer be instructed to deal with the rateability of persons in respect of properties affected by air-raid damage on the basis that where a tenancy was thereby restricted to part only of the premises and a reduced rental demanded of the tenant, a corresponding temporary reduction in rateable value should be made.

In such circumstances the appellants' collector agreed with the respondent to accept a sum less than the full sum demanded which was based on the full rateable value, and the borough treasurer accepted this sum:—

Held, that the respondents had no power to accept this reduced sum, there being no evidence of the poverty of the respondent; and that the justices had no power to dismiss the complaint for non-payment of the full sum demanded, but that if, under the Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 4, they were satisfied that the respondent was unable to pay by reason of circumstances attributable to the war, their proper course under s. 1, sub-s. 2 (a) was to order the warrant of distress to issue, but to stay a levy thereunder without further order.

CASE stated by justices.

Stepney Borough Council, as rating authority, preferred a complaint before justices of the county of London (Tower Division), against the respondent, Joseph Woolf, for the non-payment of 24*l.* 10*s.* 6*d.* rates in respect of premises, 129 Hanbury Street, Stepney. The respondent's name appeared in the valuation list and the rate book as the occupier of the premises which were entered in Part II. of the valuation list as industrial hereditaments with a rateable value for industrial purposes of 32*l.*, and for non-industrial purposes of 43*l.*, a total rateable value of 75*l.* On September 16, 1940, the industrial part of the premises was damaged by enemy action and was vacated, but the non-industrial part remained habitable and the respondent continued to live therein, paying 1*l.* 6*s.* a week rent to the owner of the premises. On November 14, 1940, a demand note for 44*l.* 7*s.* 6*d.* in respect of instalments of the general rate made on April 1, 1940, and based on the full rateable value of 75*l.* was served on the respondent. As a result of representations by the respondent and the damage to the vacant part of the premises, the rate collector agreed with the owner of the premises on behalf of the respondent that the rates payable in connexion therewith should be based on the weekly rent of 1*l.* 6*s.*, giving a rateable value for the non-industrial part of the premises of 29*l.* On March 31, 1941, the premises were inserted in a provisional valuation list, the original 75*l.* being stated as the rateable value and no objection was made. On May 8, 1941, the rate collector accepted 11*l.* 7*s.* 8*d.* in full discharge of liability for the rates demanded on November 14, 1940, this 11*l.* 7*s.* 8*d.* being calculated on the reduced rateable value of 29*l.*, and that sum was accepted by the borough treasurer. On May 10, 1941, the premises were further damaged by enemy action and as from that date they ceased to be occupied altogether.

The agreement between the owner and the rate collector was made as a result of a resolution of the joint finance, parliamentary and valuation committees of the council consequent on the receipt of a letter, dated November 22, 1940, and issued by the Ministry of Health to rating authorities; the material paragraph of which was : " Cases may well arise " where, in default of other available accommodation, occupiers " continue temporarily to use as essential shelter some part of " their damaged premises. It is suggested that rating authori- " ties might well regard many such cases as justifying the

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"exercise of their discretion under s. 2, sub-s. 4, of the Rating and Valuation Act, 1925, or in London under the Remission of Rates (London) Act, 1940, as to the total or partial remission of rates." On receipt of this letter the borough treasurer and the town clerk made reports thereon to the joint meeting of the committees mentioned, and on December 22, 1940, the joint meeting resolved that the borough treasurer be instructed to deal with questions affecting the rateability of properties affected by air-raid damage on the basis of the recommendations contained in the reports, namely, that where a tenancy was restricted to part only of the premises and a reduced rental demanded from the tenant a corresponding temporary reduction in rateable value should be made, based on a figure obtained from the valuation officer, the reduction to be treated in the rate books as "part void." In accepting the payment of 11*l.* 7*s.* 8*d.* from the owner the rate collector was acting in pursuance of this resolution and the justices found that in so doing he was acting for the council within the scope of his duties and in conformity with the authority vested in him.

It was not contended before the justices that the respondent was not in occupation of the hereditaments, but the payment of 11*l.* 7*s.* 8*d.* and the receipt thereof were relied on as amounting to a discharge in full of his liability in respect of the instalments of the rate made on April 1, 1940. The justices decided in favour of this contention, and, further, held, as to the balance claimed, that they were satisfied that the respondent was unable to pay by reason of circumstances directly or indirectly attributable to the war, and that, accordingly, under the Courts (Emergency Powers) Act, 1939, and the rules made thereunder, they had a discretion to refuse to allow the issue of a warrant of distress, and they, accordingly, dismissed the complaint. The council appealed.

Havers K.C. and *S. Lincoln* for the council. Justices have no discretion whether or not to issue a warrant of distress in such a case as the present. The Remission of Rates (London) Act, 1940 (which by s. 1 applies s. 2, sub-s. 4, of the Rating and Valuation Act, 1925 (1) to London) only enables the

(1) Rating and Valuation Act, 1925, s. 2, sub-s. 4: "A rating authority shall have power to reduce or remit the payment of

"any general rate on account of
"the poverty of any person liable
"to the payment thereof."

rating authority to reduce the payment of the rate. It does not do away with the ratepayer's liability to pay. The proper course for the justices to adopt would have been to grant the warrant for the full amount of rates, but, if they were satisfied that the respondent was unable to perform his obligation because of the war, to stay the levy of distress until further order: Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 4. The council had no jurisdiction to make, through the rate collector, the agreement for the reduction of the rates, for the premises stood in the valuation list at a rateable value of 75*l.*, but under s. 2, sub-s. 4, of the Act of 1925 (1) they could have refrained from levying distress. [*Reg. v. Marsham* (2) was referred to.]

Simes for the respondent. The justices were right to refuse to grant a warrant if they thought, as they did, that in the circumstances distress should not be levied, for, as appears from Form C1 of warrant in the schedule to the Distress for Rates Act, 1849, the proper officer is thereby directed "forthwith to make distress." As pointed out in *Potts v. Hickman* (3), in the case of rates there is no previous judgment inter partes before execution is applied for. The rate itself is equivalent to a judgment. There is only one procedure, namely, the issue of a warrant. The justices authorize distress "forthwith" by the grant of a warrant. The agreement made by their collector under the authority of the council delegated to him by their resolution, was valid. It is said that they risked a surcharge, but the Minister has power under s. 229 of the Local Government Act, 1933 (applied to London by s. 243), to quash a surcharge by the auditor, and in this case would do so as the council had acted on his recommendation. "Poverty" in s. 2, sub-s. 4, of the Act of 1925 (1) should be construed widely in the case of air-raid damage. These premises were in a working-class district at a low rental and were largely destroyed, so that "poverty" so construed should be assumed.

Havers K.C. replied.

Cur. adv. vult.

1942. Dec. 2. The judgment of the court (VISCOUNT CALDECOTE C.J. and TUCKER J.) was read by TUCKER J. who stated the facts, and continued: Two points, both of

(1) See note (1), ante p. 204.

(3) [1941] A. C. 212, 241.

(2) (1883) 50 L. T. 142.

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considerable importance, were argued before us: (1.) whether the agreement made by the rate collector was binding in law on the council so as to preclude them from seeking to recover the balance which would be due on the basis of the entries in the valuation list and rate book in respect of a rate duly made and demanded; (2.) if not, or, in any event, as to so much of the sum claimed as was not covered by the agreement and payment, whether, on being satisfied of the respondent's inability to pay due to the war, the justices were entitled to refuse the issue of a warrant, or whether they were bound, on proof of the necessary formal matters, to order the warrant to issue, subject only to an order staying the levying of distress under the warrant without further order by the court.

As to the first point, counsel for the respondent relied on the Remission of Rates (London) Act, 1940, which by s. 1 applies to London the provisions of s. 2, sub-s. 4, of the Rating and Valuation Act, 1925. It was argued that the word "poverty" in that section should be given a liberal interpretation which would include a case such as the present where an occupier of premises of low rental value in a working-class district suffers damage to his premises which renders them in part uninhabitable. We are unable to accept this contention. There is no evidence that the council or their rate collector ever applied their minds to the question of the wealth or poverty of the respondent. His case was dealt with pursuant to a resolution empowering the borough treasurer to deal with war-damaged premises in certain categories in a uniform manner regardless of the means of the occupiers. In the absence of some statutory authority—and none was suggested other than the sub-section quoted above—it is, in our view, clear that a rating authority has no power to release in whole or in part any person liable to pay a rate which has been lawfully made. It is unnecessary to express any view as to the exercise by rating authorities of their discretion to refrain as a matter of grace in proper cases from enforcing the payment of rates legally due. Nothing in our decision in this case in any way affects any such question. In our opinion, therefore, subject to the effect of the Courts (Emergency Powers) Act, 1939, the justices were, on the facts found in this case, bound to order the issue of a warrant of distress.

As to the second point, we were informed that its importance in practice is that, if the justices were right in dismissing the

complaint, it follows that, if at any future date the respondent's financial position improves, it would be necessary for the council to make a fresh complaint and, on the hearing thereof, to call evidence not only as to the respondent's means, but to prove again the necessary formal matters which must be established before a warrant can issue. As many hundreds of cases are often dealt with at a time, these considerations are not without importance to rating authorities. The answer to this question depends on the true construction of s. 1, sub-s. 2 (a) (i.) of the Courts (Emergency Powers) Act, 1939, and rr. 5 and 17 of the rules made under that Act. Sect. 1, sub-s. 2, provides: "Subject to the provisions of this section, "a person shall not be entitled, except with the leave of the "appropriate court,—(a) to proceed to exercise any remedy "which is available to him by way of (i.) the levying of "distress." Rule 5 of the Courts (Emergency Powers) (Consolidation) Rules, 1940, reads as follows: "The appropriate "court for giving leave to levy a distress for rates shall be the "court having jurisdiction to issue the warrant of distress." By r. 17: "(1.) In proceedings for the recovery of rates, the "application for leave to levy a distress may be made at the "hearing of the summons for non-payment of rates if a notice "to the effect of Form No. 9 has been served on the defendant "in the manner in which such a summons may be served not "less than two clear days before the hearing of the summons. "(2.) No warrant of distress for rates shall issue unless the "court is satisfied that a notice has been served in accordance "with the provisions of the last preceding paragraph. (3.) If "a warrant of distress for rates has, whether before or after "the commencement of the Act, been issued without leave "having been given under the Act, and the distress has not "been levied, an application for leave to levy the distress may "be made to the court at the hearing of a summons in a form "adapted from Form No. 4 and served on the defendant in "the manner in which a summons for non-payment of rates "may be served." It is to be observed that in r. 17, sub-r. 1, a distinction is drawn between "the application for leave to "levy" and "the hearing of the summons for non-payment "of rates." Again, in sub-r. 2, the issue of the warrant of distress is spoken of, and in sub-r. 3 there is a clear distinction drawn between the issue of the warrant and the application for leave to levy. This variation of phrase was relied on by counsel for the council as indicating that, on the hearing of

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the summons for non-payment of rates, the justices are, in the first instance, concerned only with the proof of the requisite formal matters, and that, on proof thereof, their duty is to order the warrant to issue, and only then, if the Courts (Emergency Powers) Act, 1939, is relied on, are they required to determine whether or not in their discretion they will refuse or stay the levying of distress under the warrant. Much reliance was placed by counsel for the respondent on the form of the warrant, which is to be found in Form C1. in the schedule to the Distress for Rates Act, 1849, by which the overseers are commanded "forthwith to make distress." It was said that the making of the rate corresponds to judgment and the issue of the warrant to execution and in this connexion we were referred to certain passages in the speeches of their Lordships in *Potts v. Hickman* (1) as tending to support this argument. It was contended that in the Courts (Emergency Powers) Act, 1939, and the rules thereunder the words "levy a "distress" and "the issue of a warrant of distress" have the same meaning, save only in sub-r. 3 of rule 17, which, it is said, provides for the exceptional case where a warrant has been issued, but not executed, before the coming into operation of the rules.

In our view, the language of the rules indicates a distinction between the application for the issue of the warrant and the application for leave to levy, and it is on the latter application, which can, of course, be dealt with at the same time as the application for the warrant, that the question of the exercise of the justices' discretion under the Courts (Emergency Powers) Act, 1939, to refuse or to stay the levying of distress arises. We think that the justices were wrong in dismissing the complaint. On the facts proved or admitted, the respondent was liable to pay the full amount of the rates claimed, but, in view of the justices' finding that he was unable to pay by reason of circumstances directly or indirectly attributable to the war, their proper course was to direct the warrant to issue, subject to an order staying the levying of distress thereunder without further order. The case will, accordingly, be remitted to the justices to deal with in the manner indicated above.

Case remitted.

Solicitor for council : *Town Clerk, Stepney.*

Solicitor for respondent : *Victor F. Deeks.*

CLAN LINE STEAMERS, LIMITED v. LIVERPOOL AND
LONDON WAR RISKS INSURANCE ASSOCIATION,
LIMITED.

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July 9, 10,
13, 20.

Insurance (Marine)—War Risks—Warlike operation—Merchant ship—Cargo of steel rounds for conversion into shells—Voyage to port mainly used for commercial purposes.

A merchant ship was engaged in carrying to a port mainly used for commercial purposes a cargo of steel rounds to be converted into shells in a factory for the use of a force in the field :—

Held, that, the cargo not yet being equipment for armed forces and its destination not being then for a force in the field but for a factory by way of such a port, the ship was not engaged in a "warlike operation" within the meaning of those words in a war risk policy of insurance.

ACTION tried by Atkinson J.

The owners of the steamship *Clan Stewart* claimed an indemnity from underwriters on a war risk policy which insured them against "the consequences of hostilities or "warlike operations by or against the King's enemies." On or about March 11, 1940, the *Clan Stewart*, while proceeding along the English Channel on the insured voyage and covered by the policy was sunk and totally lost as a result of a collision with the steamship *Orlock Head*. The sole question was whether the sinking was the consequence of a warlike operation. At the time of the collision the *Orlock Head* was in the course of a voyage from Manchester and Liverpool to Rouen and Dunkirk. In March, 1940, waters immediately around the British Isles, including the English Channel, were dangerous to vessels navigating therein on account of the possibility of attack by the enemy. The *Orlock Head* had been routed by the naval authorities at the port of departure and was proceeding in accordance with such instructions. She was armed with gun protection against air and submarine attack and carried a naval gunner on board. The cargo consisted of 1519 tons of steel rounds and 168 tons of general merchandise. The shippers of the steel rounds acted in and about the shipment as agents for the French Armament Mission in England and also as agents for the time charterers. The steel rounds were intended for the making of shells to be used by the French Republic in

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warlike operations against the armed forces of the enemy. In March, 1940, the French Armament Mission was engaged, in collaboration with the British government through the Ministry of Supply, in procuring and shipping from England to France the essential supplies of the munitions of war, and such shipments were being regularly made from British foundries via, among other ports, Manchester and Liverpool to Rouen and Dunkirk. As regards Dunkirk, between January and April, 1940, two ferry vessels made forty-six voyages to Dunkirk carrying troops and lorries for the purposes of the British army. One hundred and sixty-eight thousand odd tons of coal and coke were shipped to Dunkirk during that time, and that was understood to have been imported for the account of the French groupements, which were organizations set up by the French government to arrange for the distribution of and payment for the coal or coke so imported. During March five thousand five hundred tons of non-military general cargo, mostly hemp and jute, were delivered at Dunkirk, carried in twelve vessels. As to Rouen, nearly five hundred thousand tons of coal and coke were imported from January to March, possibly partly for use by the military. As far as military cargoes were concerned, up to March 11 of that year less than five thousand tons had been shipped to Rouen for the purposes of the British army. There were no figures known as to what had gone to Rouen for the French army. Atkinson J. drew the inference that both Dunkirk and Rouen were being used mainly for ordinary commercial purposes, and also to a limited extent to unload a certain quantity of military stores for the British army, and some war material, whether manufactured or unmanufactured did not appear, for the French government.

*Sir Robert Aske K.C. and A. J. Hodgson for the plaintiffs.
Sellers K.C. and E. W. Brightman for the defendants.*

Cur. adv. vult.

1942. July 20. ATKINSON J. It is now settled law that, if there is a collision between two ships either of which is engaged in a warlike operation, the ensuing damage is a consequence of that warlike operation, provided that the ship so engaged was an effective cause of the disaster :

Board of Trade v. Hain Steamship Co., Ltd. (1) and *Yorkshire Dale Steamship Co., Ltd. v. Minister of War Transport* (2). The *Orlock Head* was admittedly an effective cause of the disaster, with which we are concerned here, and, therefore, the only question to be determined is whether she was engaged in a warlike operation, an expression admittedly of wider application than "hostilities." Lord Sumner has described the expression "consequence of warlike operations" as deliberately wide and incidentally rather vague (3). There has been a striking development of the application of the words by a series of decisions of the House of Lords, and it may very well be that that development has not reached finality. In *Yorkshire Dale Steamship Co., Ltd. v. Minister of War Transport* (4) Lord Wright traces this development. Having shown how it is now settled that a warship going about its appointed duty, whatever that duty may be, is engaged on a warlike operation, the learned Lord deals with the question when a merchant vessel may be treated on the same footing as a war vessel and be deemed to be engaged in a warlike operation. This depends, he says, on the nature of the cargo and the voyage. Lord Wright does not say what the cargo must be, nor what the voyage must be, but he gives one or two illustrations of what cargo and what sort of voyage constitute a warlike operation, and it will be remembered that Lord Atkin said in express terms that he had read Lord Wright's opinion and agreed with it. In that case the *Coxwold* was proceeding in convoy from Greenock to Narvik, and was, at the time of stranding, admittedly engaged in a warlike operation, namely, proceeding from one war base to another war base with military stores for the use of the British forces in the field. Lord Wright says (5): "If the vessel is run down in war time by a friendly warship, even though accidentally, the cases have treated such a loss as due to a war peril, as being a consequence of the warship's operations which are treated as warlike operations though prima facie the collision is a peril of the seas within the clause. But the authorities have given a further extension to the scope of these words. In certain circumstances, a trading or merchant

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(1) [1929] A. C. 534.

(2) [1942] A. C. 691.

(3) *Commonwealth Shipping Representative v. Peninsular and**Oriental Branch Service* [1923] A. C. 209.

(4) [1942] A. C. 705.

(5) *Ibid.* 708.

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"vessel has been held to be for purposes of the war-risk clause engaged in a warlike operation. As illustrative of these circumstances, I may take those of a merchant ship carrying troops, ammunition, guns, tanks, or other military machines or equipment to a theatre of war or away from a theatre of war as in the evacuation of the British forces from Norway, Greece or Crete or elsewhere. Such a vessel may be regarded pro hac vice as serving the belligerent purposes of the country and as taking her share in hostilities against the enemy. She is, therefore, it is said, to be deemed to be engaged on a warlike operation within the meaning of the war-risk cover. So it has been laid down by this House under T.99, the charterparty used in the last war." Referring to the *Clan Line Steamers, Ltd. v. Board of Trade* (1), he said (2): "The *Western Front* was held to be engaged on a warlike operation because her cargo was entirely made up of war supplies for the forces of the United States Government, and she was bound to St. Nazaire, which was a war base." It is true that in the case before the House the question to be decided was whether the stranding was a consequence of the war-like operation on which the *Coxwold* was admittedly engaged. The definition of "warlike operation" was not primarily before the House, but an examination of the earlier authorities will show that these illustrations mark the limit to which they have gone in holding merchant ships to be engaged in warlike operations.

The illustrations, in so far as they are relevant to this case, involve three features: (1.) The cargo visualized is a cargo of military equipment or military stores; (2.) the cargo is destined for a theatre of war; or, put otherwise, for a military force engaged in military operations; (3.) it is on its way to a place where it will be available for that military force. I need not refer to the reverse operation of saving or bringing home equipment or stores. If material of use to an army is being taken to an army engaged in a military operation to enable it to carry on its operations more effectively, it is, of course, reasonable to regard the voyage as a part of the military operations themselves. In the case before me all these features are absent. The cargo was not a cargo of military equipment or stores. The cargo would be useless to an army. It was not destined for an army. It was not being taken to an army, or to any place where it was to be

(1) [1929] A. C. 514.

(2) [1942] A. C. 712.

available for an army. Is it possible to regard the voyage as a warlike operation, or as part of a warlike operation, merely because the cargo was intended to be of use in future operations after it had been turned into shells? The strongest way, perhaps, in which the plaintiffs' case could be put is by asking the following question: If Russia said to Great Britain, "Send us shells and steel rounds as quickly as you can," and if, in response, ship A went in convoy to Murmansk laden with shells and ship B went to Murmansk in the same convoy laden with steel rounds and both were stranded and lost in circumstances similar to those in *Yorkshire Dale Steamship Co., Ltd. v. Minister of War Transport* (1), could it logically or reasonably be said that ship A was lost in consequence of a warlike operation, but that ship B was not so lost? Would not both voyages be warlike operations? If the answer is in the affirmative, it would follow that the fact that the cargo is not in a form immediately usable by an army and that it is destined for a factory and not for an army does not necessarily prevent the voyage being a warlike operation. The problem is where is the line to be drawn? When is an operation a warlike operation and when is it merely an operation in war? Wherever the line is drawn, there will be cases on either side of it very near to the line, and, therefore, to each other. There is a plain cleavage between the manufacture of armaments and the user of arms. Normally it is the work and duty of the civilian population to provide armaments for the army. Civilian factories manufacture shells and hand them over to the army authorities for their use. The army authorities, when they get them, send them to their forces in the field as they think best. The carriage of raw material is part of the task of production. The service is rendered, not directly to the army, but to those responsible for production.

What light do the cases throw on the question? In *Leyland Shipping Co., Ltd. v. Norwich Union Fire Insurance Society, Ltd.* (2), it was laid down that the question whether a loss was by perils of the sea or by a consequence of hostilities was one of fact to be determined, said Lord Dunedin, by common sense principles. Common sense principles may well create some difficulty in regarding production as a warlike operation. In *Britain Steamship Co., Ltd. v. The King* (3),

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(1) [1942] A. C. 691.

(2) [1918] A. C. 350.

(3) [1919] 1 K. B. 575.

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which was tried by Bailhache J., the steamship *Petersham* had been requisitioned by the Director of Transport on behalf of the Admiralty on the terms of charterparty T.99. She was on a voyage from Bilbao to Glasgow with a cargo of iron ore. She was being navigated without lights in accordance with Admiralty regulations, and she came into collision with another steamship bound for Spain, and was sunk. It was claimed that the fact that the *Petersham* was sailing without lights on a prescribed route constituted the voyage a warlike operation. The claim failed, but no one suggested that the *Petersham's* occupation was other than peaceful, although in a later case Scrutton L.J. pointed out that there was a strong presumption that the ore was wanted for munitions. At the same time Bailhache J. gave judgment in *British India Steam Navigation Co. v. Green* (1) concerning the *Matiana*. She was one of four ships proceeding in convoy from Alexandria to the United Kingdom and carrying cotton. The vessel was pursuing a zig-zag course and was sailing through a submarine infested area. The master was north of his course and ran into the Keith Reef. The position was hopeless from the beginning, and later she was torpedoed. It was held that the loss was due to stranding, but that the stranding was due to a warlike operation, namely, sailing in convoy on a chosen route and taking precautionary measures necessary because of the presence of hostile submarines. Both cases were dealt with by the Court of Appeal at the same time (2). Warrington L.J. said (3): "To my mind the expression suggests some act done by one of two parties at war with each other against the other of them, or by one of such parties with the object of meeting or avoiding an actual or threatened attack by the other." I underline the words "some act . . . against the other of them." Atkin L.J. said (4): "I think that warlike operations connote the attributes of operations that form part of a series of acts of war, belligerent acts by combatant forces, whether offensive or defensive." The dominating or illuminating word, I think, is the word "belligerent." Carrying shells to troops engaged in combat may well be regarded as a belligerent act, but can the taking of steel bars to a country be so regarded? I may say that the Court of Appeal reversed the decision in the *Matiana* case and held that neither of the ships was engaged

(1) [1919] 1 K. B. 632.

(3) Ibid. 683.

(2) [1919] 2 K. B. 670.

(4) Ibid. 695.

in a warlike operation. The case went to the House of Lords (1), where Viscount Cave, after saying that there was nothing to show for what purpose the iron ore was intended to be used, continued (2): "In order that the words [warlike operation] 'may apply, there must be some act of war or of a 'warlike character which could have caused the loss sued 'upon Both the *Petersham* and the *Serra* " (the ship with which she collided) "were proceeding upon a "peaceful mission and their desire was not to engage in, "but by all means to avoid, warlike operations." Lord Atkinson said (3): "The words 'warlike operations' have "a much wider reach, and not only include 'hostilities,' but "cover even where a state of war does not exist, "operations of such a general kind or character as "belligerents have recourse to in war, as for instance where "combative operations are undertaken to suppress a rebellion "against an allied or friendly power, or where the territory "of a nation has 'before war has been declared' required, in "anticipation of attack, to be protected by such defensive "measures as laying down mines. The transfer of the com- "bative forces of a power from one area of war to another, "or from one part of an area of war to another part, for "combative purposes, would, I think, be a 'warlike operation' "within the meaning of this charterparty, as would also be "the patrolling by the ships of war belonging to a nation of "the sea coast of that nation, or of an allied nation, for the "purpose of preventing invasion, or even for the purpose of "protecting from hostile attack by enemy vessels the lives "and property of the inhabitants of its seaboard towns. If "in the course of this patrolling a ship of war collided with and "sank a merchant vessel the loss would, of course, be a direct "consequence of a 'warlike operation.' If, however, the "inhabitants of such a town, in order to prevent its being made "a target for the fire of an enemy's vessels of war, chose "voluntarily, or upon compulsion, to screen all their lights "and bury their town in almost complete darkness, this wise "measure of precaution could not, I think, with reason, be "described as a 'warlike operation,' though it might incident- "ally vastly increase the dangers attending locomotion in the "streets and thoroughfares of the town. And just as I am "of opinion that patrolling, such as I have mentioned, would

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(1) [1921] 1 A. C. 99.

(2) Ibid. 108.

(3) Ibid. 114.

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"be a 'warlike operation,' so also am I of opinion, for the reasons I shall presently give more fully, that the shepherding, directing and protecting from possible attack by ships of war of convoyed merchantmen are on the part of those ships of war, though not on the part of the merchantmen convoyed, 'warlike operations.' Of course, if a merchantman chose to take combative action, such as attempting to ram an enemy submarine, that action would, while it lasted, be a 'warlike operation.' The sailing over the sea by a cargo-carrying ship from port to port is in its nature a peaceful adventure" Lord Sumner said (1) that the operation of the *Petersham* was peaceable. She was doing nothing warlike, and it did not become a warlike operation merely because its object was to baulk warlike operations on the part of the enemy. Lord Wrenbury (2) said that the expression was not the same as a consequence of the existence of a state of war. He said to define "operation" was, no doubt, a matter of great difficulty and was not necessary in that case. I think that the main idea both in the Court of Appeal and in the House of Lords was something combatant, taking part in something which may fairly be considered an act of combat. *Attorney-General v. Ard Coasters, Ltd.* and *Liverpool and London War Risks Insurance Association, Ltd. v. Marine Underwriters of s.s. Richard de Larrinaga* (3) were both concerned with warships, and I do not think they are helpful, but in 1923 there was, perhaps, the most relevant case of all, *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service* (4). It concerned the *Geelong*, which had been sunk in the Mediterranean by collision with the *Bonvilston*. The Court of Appeal upheld Bailhache J. in holding that the voyage of the *Bonvilston* was a warlike operation. She was carrying war stores from Mudros to Alexandria, that is, from one war base to another, and the question whether she was engaged in a warlike operation had been decided by an arbitrator in the negative. He held that the collision was caused by a marine and not by a war peril, and the question stated by him for the opinion of the court was whether he was right in so holding. Both the court of first instance and the Court of Appeal had held that the ship was engaged in a warlike operation, but Warrington L.J. and Pickford L.J. had relied, at any rate in part, on the facts that at that

(1) [1921] 1 A. C. 99, 128.

(2) *Ibid.* 133.

(3) [1921] 2 A. C. 141.

(4) [1923] A. C. 191.

particular time our army was evacuating Gallipoli and that Mudros was known to be the base from which our ships had been operating. Scrutton L.J. thought that, quite apart from that, the ship was engaged on a warlike operation, because she was taking war stores from one war base to another. The opinions expressed in the House of Lords demand the most careful analysis. It is the only case where the meaning of the words "warlike operation" and the question when the nature of the voyage and the cargo carried turns the voyage of a merchant vessel into a warlike operation have been considered directly. All the members of the House put on one side the element in the decision of the Court of Appeal that the *Bonvilston* was taking part in the evacuation of Gallipoli, the decision being affirmed on the ground that the ship which sank the *Geelong* was carrying necessary war equipment to an area of war for the use of His Majesty's forces. Viscount Cave L.C. said (1): "My Lords, I do not 'propose to attempt to define the expression 'warlike operations.' It is composed of ordinary English words in 'common use, and to define them by other like words might 'only produce a call for further definition. But it is possible 'to go some way in considering what is or is not included in 'the expression. Plainly it does not include all operations 'in war, or even all operations for the purposes of war. For 'instance, the *Petersham*, which was carrying iron ore to be 'used in the manufacture of munitions, and the *Matiana*, 'which was carrying cotton which might well have been 'intended to be used for the clothing of troops, were held by 'all the members of your Lordships' house who heard the 'appeals in those cases not to be engaged in warlike operations: *Britain Steamship Co. v. The King*" (2). Pausing there it is without doubt true, as was pointed out by Sir Robert Aske, that Lord Cave was mistaken in saying that the *Petersham* was carrying ore to be used in the manufacture of munitions. There was no evidence of the purpose for which the raw material was being used, and it had not in fact been decided that the carriage of ore to be used in the manufacture of munitions was not a warlike operation. At the same time, it is difficult to suppose that Lord Cave could say what he did unless he thought it was clear that the carriage of raw material for the purpose of munitions was not a warlike operation. Scrutton L.J., in *Clan Line Steamers, Ltd. v.*

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(1) [1923] A. C. 198.

(2) [1921] 1 A. C. 99.

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Board of Trade, said (1): "I also notice that Lord Cave in "*Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service* (2) speaks of the cargo of iron ore "on board the *Petersham* as intended to be used in the manu- "facture of munitions, but that did not make the vessel "engaged in a warlike operation." Lord Cave continued (3): "On the other hand, the expression is not confined to actual "combatant operations against the enemy, whether by way "of attack or defence; for in *Liverpool and London War Risks Insurance Association v. Marine Underwriters of s.s. Richard de Larrinaga* (4), a warship on her way to pick "up a convoy was held by this House to be engaged in a "warlike operation. Indeed, it has been said that almost any "movement of a warship in the course of her duties may "be included in the phrase 'warlike operations.' Probably "the phrase includes all those operations of a belligerent "Power or its agents which form part of or directly lead up to "those processes of attack and defence which are of the essence "of war. Thus, as was said by Lord Atkinson in the "*Petersham* case, the transfer of the combative forces of a "belligerent Power from one area of war to another for com- "bative purposes would be a warlike operation; and the "same may, I think, be said of the transport in like manner "of guns or munitions of war. Nor, in my opinion, can "any valid distinction be drawn in this respect between "munitions of war and the materials for equipping a fighting "force, such as saddles for the cavalry, field kitchens for the "infantry, or ambulance wagons for the wounded in battle. "All these things are an essential part of the equipment of an "army in the field, and to transport them to an area of war "is a part of the warlike operations conducted in that area not "less essential than the provision of men, guns, rifles, or "ammunition." Then come these very important words: "If this be—as I think it is—the true meaning of the expression "to be construed" It seems to me that means that, in his opinion, the transport of army equipment to an area of war in which warlike operations are being conducted is in itself a part of such warlike operations because the voyage leads directly up to a process of attack or defence. Lord Atkin, I think, conveyed just the same idea (5): "In

(1) [1928] 2 K. B. 557, 572.

(4) [1921] 2 A. C. 141.

(2) [1923] A. C. 198.

(5) [1923] A. C. 204.

(3) *Ibid.* 199.

"the absence of any circumstances tending to put a different colour upon the transaction, the carriage in time of war of ambulance wagons and other government stores from one war base to another war base is carriage for the purposes of war. It is immaterial whether the wagons and stores are being taken to a base for the purpose of warlike operations to be conducted from that base, or are being fetched away from a base because the warlike operations conducted from it have ceased. In either case the carriage is part of a 'military operation,' that is, it is part of a military operation if it is being taken to a base for the purpose of warlike operations to be conducted from that base. Lord Dunedin endorsed what had been said by the Lord Chancellor (1). Lord Atkinson said (2): "Whether the *Bonnylston*, when carrying these ambulance wagons to Alexandria, was or was not engaged in a 'warlike operation' will depend very much, if not entirely, on the purpose for which they were carried there. In the judgment which I delivered in *Britain Steamship Co. v. The King* (3), which I would not have alluded to, but that it has been so often referred to, I clearly indicated that this purpose is in such cases a vital matter to be considered. I said: 'The transfer of the combative forces of a power from one area of war to another, or from one part of an area of war to another part, *for combative purposes*'"—and those three words are emphasized by italics—"—would, I think, be a "warlike operation." I adhere to that opinion, and I think the principle applies to the carriage of wagons, ammunition, guns or other material things carried to and discharged at a particular place for the purpose of being used by the forces of the Crown operating in a field of action in which the landing place is situated, in attacking their enemy, or defending themselves against his attacks." Lord Sumner said (4): "'Warlike operations' is an expression deliberately wide and incidentally rather vague, but it has been held that a mere operation during war is not warlike, if it is not also an operation of war. On the other hand, what is more like war than doing with the indispensable equipments of an army such things as have to be done, in order that the army may itself engage the enemy with proper provision for those who fall?"

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(1) [1923] A. C. 205.

(2) *Ibid.* 206.

(3) [1921] 1 A. C. 114.

(4) [1923] A. C. 209.

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In *Attorney-General v. Adelaide Steamship Co., Ltd.* (1) it was conceded that a ship proceeding to Southampton with six hundred and three wounded men on board was engaged in a warlike operation. In *Hain Steamship Co., Ltd. v. Board of Trade* (2), the *Roanoke*, a United States vessel employed solely for naval purposes as a regularly conditioned mine planter of the United States navy, was held to be engaged on a warlike operation while carrying seven hundred and twenty mines back to the United States after the armistice. Scrutton L.J., quoting Lord Cave, said (3): "Probably the phrase 'includes all those operations of a belligerent Power or its agents which form part of or directly lead up to those processes of attack and defence which are of the essence of war.' The question of the armistice was not before the Lord Chancellor, but I should amend the definition 'by reading 'directly lead up to or are the necessary result 'of.''" There is a passage in the judgment of Lawrence L.J. (4), that a return after victory or defeat was a movement of a combatant force directly connected with its combatant duties, and was, therefore, a warlike operation, and Greer L.J., in effect said the same thing (5).

In *Clan Line Steamers, Ltd. v. Board of Trade* (6), in the Court of Appeal, the facts were that the *Clan Matheson* sailed in convoy from New York to Nantes, a war base but also a commercial port. She had a cargo of 363 tons of steel for shells, 5,962 tons of barley, and 1,178 tons of oats. The steel was intended for war use, and two-thirds of the oats as well, that is, about sixteen per cent. of the total weight of the cargo. She collided with the *Western Front* and sank. The cargo of the *Western Front* was exclusively of war supplies bound for St. Nazaire, the war base for American troops. The collision was due, not to any act of the *Western Front*, but to the sheering of the *Clan Matheson* into the *Western Front*, and ultimately the case failed on that ground. The arbitrator had held that the *Clan Matheson* was not engaged on a warlike operation, but that the collision was a consequence of a warlike operation because the *Western Front* was so engaged. The case first came before Wright J., who said (7): "The cargo destined 'for the military authorities was a comparatively small

(1) [1923] A. C. 292.

(2) [1928] 2 K. B. 534.

(3) Ibid. 544.

(4) Ibid. 547.

(5) Ibid. 553.

(6) [1928] 2 K. B. 557.

(7) (1928) 97 L. J. (K. B.) 737.

"portion of the whole and was of a character not directly referable to use or immediate use in war; the steel would need to go to a munition factory to be made into shells, and the oats intended for the military authorities might be used for feeding horses or mules far from the lines; the term 'warlike operations' is not capable of precise definition, and 'does not include all operations in war or even all operations for the purpose of war' (per Viscount Cave L.C. in the case cited (1)). In any case the character of the cargo and the port of destination were predominantly civil. . . . I accept the arbitrator's finding on this point . . ."

It was still contended in the Court of Appeal that the *Clan Matheson* itself was engaged on a warlike operation, but on that issue the claim failed, and in the House of Lords it was conceded that the *Clan Matheson* was not engaged on a warlike operation.

The conclusion at which I have arrived from a careful examination of the authorities is that a warlike operation is one which forms part of an actual or intended belligerent act or series of acts by combatant forces. It may be performed preparatory to the actual act or acts of belligerency, or it may be performed after such act or acts, but there must be a connexion sufficiently close between the act in question and the belligerent act or acts to enable a tribunal to say, with at least some modicum of Lord Dunedin's common sense, that it formed part of acts of belligerency. If military equipment is being taken in a ship to a place behind the fighting front from which the forces engaged, or about to be engaged on that front, may be supplied, that ship may beyond question be said to be taking part in a warlike operation. If a ship is bringing home such equipment after it has been employed on a fighting front or has been lying available for and at the service of a fighting front, again beyond question, she is taking part in a military operation, but to hold that to carry steel rounds on behalf of the French Armament Mission from Manchester to a port mainly used for commercial purposes, albeit also used at times for receiving supplies of munitions of war, for carriage to some factory or factories doubtless to be chosen because of their distance from the fighting front is a warlike operation would be to hold something which, in my judgment, would be completely out of harmony

(1) *Commonwealth Shipping Co. v. Peninsular and Oriental Branch Service* [1923] A. C. 198.

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with the substance of everything said since the decision of *Britain Steamship Co., Ltd. v. The King* (1). The cargo of the *Orlock Head* was not yet military equipment. I do not say that that is in itself conclusive. It is unnecessary so to decide. Army workshops may, for all I know, have to handle much material not yet in its final usable form, but this cargo was not destined for a force in the field, but only for a factory. It was not being carried to a place where it would be available for an army in the field, that is, an army engaged in or about to engage in acts of belligerency. It was not connected with any belligerent act or acts of any army in being, and, in my judgment, it is outside everything indicated in the cases to which I have referred. It is quite true that odd sentences here and there may be found in the judgments and opinions given in the cases which, taken by themselves, may seem to go beyond the view which I think the cases present, for example, a passage much stressed by Mr. Hodgson: "The real point to my mind . . . is whether the ship in question was engaged on a war errand, so that she was engaged in a "warlike operation at the moment when the collision occurred," language used by Lord Wrenbury in *Liverpool and London War Risks Insurance Association, Ltd. v. Marine Underwriters of s.s. Richard de Larrinaga* (2), but if the context is examined it will be seen that he was speaking, not of a commercial ship, but of a warship where different considerations apply. If there is to be a further development in the application of the words "warlike operation" it must come from a higher tribunal than a judge of first instance. In my judgment, therefore, the collision was not a consequence of hostilities or of a warlike operation, and the claim fails.

Judgment for defendants. (3)

Solicitors for plaintiffs: *Coward, Chance & Co.*

Solicitors for defendants: *Gregory, Rowcliffe & Co.*

(1) [1921] 1 A. C. 99.

(2) [1921] 2 A. C. 156.

(3) An appeal by the plaintiffs from this decision was entered but later withdrawn.

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Where a plaintiff claims damages for injury caused to him by the defendant's breach of reg. 3 or reg. 4, of the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935 (now regs. 3 and 4 of the Pedestrian Crossing Places (Traffic) Regulations, 1941), the defence of contributory negligence on the part of the plaintiff is available to the defendant.

Bailey v. Geddes [1938] 1 K. B. 156, explained.

Caswell v. Powell Duffryn Associated Collieries, Ltd. [1940] A. C. 152, applied.

Regs. 3 and 4 of the regulations of 1935, *held*, not to be invalid as being unreasonable either in the requirements exacted by them from the drivers of motor vehicles or on the ground that they involve a slowing down of motor traffic to an extent which is injurious to the commercial community.

APPEAL from Croom-Johnson J.

During the hours of "black-out," on December 28, 1940, the plaintiff, Frank Henry Sparks, while crossing an uncontrolled pedestrian crossing at Lewisham, S.E., was knocked down and injured by a motor lorry owned by the defendants, Edward Ash, Ltd., and driven by their servant. The plaintiff claimed damages for personal injuries, alleging that the accident was caused by a breach by the driver of the lorry of regs. 3 and 4 of the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935 (1). Croom-Johnson J. found that the defendants by their driver had been guilty of a breach of

(1) Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, regs. 3 and 4 [see now Pedestrian Crossing Places (Traffic) Regulations, 1941 (St. R. & O., 1941, No. 397), regs. 3, 4]. Reg. 3: "The driver of every vehicle approaching a crossing shall, unless he can see that there is no foot passenger

"thereon, proceed at such a speed as to be able if necessary to stop before reaching such crossing."

Reg. 4: "The driver of every vehicle at or approaching a crossing where traffic is not for the time being controlled by a police constable or by light signals shall allow free and

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the statutory regulations, but, on the authority of *Bailey v. Geddes* (1) that, reg. 3 being positive in its terms, it was not open to the defendants to raise the defence of contributory negligence by the plaintiff. He gave judgment for the plaintiff for 1515^l. The defendants appealed.

Cartwright Sharp K.C. and *Fox-Andrews* for the defendants. There seems to be no reason why the defence of contributory negligence should not be available in such a case as the present merely because the act of the defendant which provides the cause of action is a breach of a statutory duty. In *Lewis v. Denye* (2), a case under the Factory Acts of injury caused by breach of a statutory duty, contributory negligence by the plaintiff was successfully pleaded by the defendant. In the present case there was evidence of contributory negligence, and the case should go back to have that issue tried. It was the duty of the plaintiff not to step on to the crossing when on-coming traffic was so near as thereby to be put in a difficulty: per Scott L.J. in *Chisholm v. London Passenger Transport Board* (3), which case shows that *Bailey v. Geddes* (1) is not of universal application, but must be considered with reference to its particular facts. In *Bailey v. Geddes* (1) the plaintiff was in fact seen by the defendant on the crossing, and the defendant's failure to obey the regulation was the cause of the accident. A pedestrian crossing, no doubt, constitutes an invitation to cross the highway, but where the circumstances are such—for example, the existence of "black-out" conditions—as to inform the pedestrian that a driver approaching the crossing cannot see him, the invitation is withdrawn. The only way in which to make reg. 3 workable is to insert at the beginning of it some such words as "if visibility permits." If the regulation is to be interpreted as is contended for by the plaintiff, traffic would be greatly hampered. [*Knight v. Sampson* (4), *Flower v. Ebbw Vale Steel, Iron and Coal Co.* (5), *Watson v. Wright* (6) and *Franklin v. Bristol Tramways Co.* (7) were also referred to.]

Alban Gordon for the plaintiff. These regulations have the

"uninterrupted passage to any
"foot passenger who is on the
"carriageway at such crossing,
"and every such foot passenger
"shall have precedence over
"all vehicular traffic at such
"crossing."

- (1) [1938] 1 K. B. 156.
- (2) [1940] A. C. 921.
- (3) [1939] 1 K. B. 426, 428.
- (4) (1938) 54 T. L. R. 974.
- (5) [1936] A. C. 206, 209.
- (6) 1940 S. C. (J.) 32, 44.
- (7) [1941] 1 K. B. 255.

force of a statute and the first canon of interpretation of a statute is that its words must be given their ordinary and natural meaning. So interpreted, the meaning of the regulation is clear. No doubt, a strict interpretation may lead to absurd results from the point of view of the motorist, but, as the meaning of the regulation is clear, the fact that compliance with it may tend to retard traffic cannot affect its interpretation. It is a matter of grave importance to the public that these regulations, made for their protection, should be strictly adhered to: per Greer L.J. in *Bailey v. Geddes* (1); and reg. 3 lays down the duty of a driver in positive terms: "Unless he can see that there is no foot passenger" on the crossing he is bound, if necessary, to stop. The words "if necessary" are explained by reg. 4, which gives precedence to the pedestrian over vehicular traffic. Under reg. 3 a pedestrian crossing is an area closed to traffic while a pedestrian is on it. This court drew a clear distinction between *Bailey v. Geddes* (1) and *Chisholm v. London Passenger Transport Board* (2) in the latter case.

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Cartwright Sharp K.C. in reply. Either these regulations are to be construed strictly in accordance with their plain language—in which case they put an impossible duty on the driver of a car in "black-out" or fog and are so unreasonable that the court should declare them to be void—or they must be construed benevolently, and words read into them equivalent to "when visibility permits."

1942. Nov. 9. The court allowed the appeal, but took time to put their reasons in writing.

Dec. 3. The following judgments were read.

SCOTT L.J. [after stating the facts and reading the material regulations.] These regulations were first made by the Minister of Transport in 1934 under the Road Traffic Act, 1934, s. 18, and laid on the table of both Houses under s. 111 of the Road Traffic Act, 1930. They were repeated in the same form in 1935, and in that form continued to be applied to all pedestrian crossings until the outbreak of war. It will be observed that they assume conditions of complete visibility. They contain no provision to assist in their application to conditions of fog—although, especially in London and some other towns, in spite of peace-time illumination of streets and

(1) [1938] 1 K. B. 156, 161.

(2) [1939] 1 K. B. 426.

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brilliant lighting of cars, visibility is often restricted to a few yards or even feet, especially at night. When war conditions supervened and street lighting was suspended, buildings had to shut in their light, and the illumination of motor vehicles was drastically cut down, it might have been supposed that at least *uncontrolled* crossings would receive some special attention, either by way of amending the regulations or under the emergency powers of war legislation, but no such action was taken. On the contrary, the same regulations as of 1935 were reintroduced on March 14, 1941. That date was, it will be noted, some weeks after the accident to the plaintiff, and the re-enactment, therefore, does not directly affect this appeal, but the existence of the identical regulations at the time of the accident, which were so reintroduced a little later as a war measure, shows that the old regulations were intended to apply in spite of the "black-out," and makes it necessary for the court to consider to what extent, and how, regulations which assumed perfect visibility are to be construed and applied in the black-out.

The case is thus one of very wide public importance. It raises directly the broad question whether effective protection is afforded to pedestrians in the "black-out" hours by the present system of pedestrian crossings, and indirectly our decision may affect the operation of the Pedestrian Crossing Regulations at all times. The validity of the regulations is challenged, and, if they are valid, we have to consider the true measure of the pedestrian's duty under the regulations, towards the driver of the motor vehicle, so far as may be involved by the facts of the present case. There is also a minor question, affecting only this particular case, which we have to decide. It arises out of the course the learned judge took below. He held that the plea of contributory negligence failed, but he so held as a decision of law, not of fact, because he considered that this court had, in *Bailey v. Geddes* (1), laid down a general rule that the plea of contributory negligence is not open to a defendant as against a plaintiff who was actually on a pedestrian crossing when the motor vehicle injured him. The minor issue raises the question whether we can dismiss the appeal or must send the case back for re-trial. That question is not disposed of, in my opinion, by saying that *Bailey v. Geddes* (1) did not lay down such a general rule, or that, if it did, what was said was obiter and wrong.

(1) [1938] 1 K. B. 156.

While it is incontestable that the interest of the pedestrian proper demands strong measures of protection, it was contended by Mr. Cartwright Sharp before us (as it had been, I think, below) that the regulations are wholly invalid on the ground that they are unreasonable in the requirements exacted by them from the drivers of motor vehicles, and because they involve the slowing down of all motor traffic to an extent, as he submitted, injurious to the commercial community of the country. He made this submission even as regards peacetime, when visibility is not cut down by black-out regulations, but urged that in war conditions it is not practically feasible to comply with them. I will deal presently with his legal argument about "unreasonableness," but I do not accept his proposition that the regulations cannot be complied with, although, no doubt, obedience to them does involve some slowing down of traffic below the maximum speed of twenty miles per hour, permissible (under the order of January 27, 1940) in built-up areas in the "black-out." As a general rule, in "black-out" conditions the driver cannot see the "indications" of an "uncontrolled" crossing from any distance away—the "Belisha beacon" not at all unless he is close to his near kerb and to the crossing, and the transverse line of road studs not until his head-light makes them shine. It is, of course, only very regular drivers on a route who know in advance just when to expect the next crossing. Some kind of solution is greatly needed which will give pedestrians real protection, but with the minimum of inconvenience to motor traffic. How far this may prove within the power of the courts gradually to achieve, through a careful consideration of the true measure of duties respectively owed under the regulations by motor driver and pedestrian alike, it is impossible to foretell. The present case, in my opinion, helps to throw some light on that inquiry, but I doubt whether in "black-out" conditions there is any complete or satisfactory solution possible without amendment of the regulations and appropriate action of an executive character by way of control or lighting.

[His Lordship reviewed the evidence and came to the conclusion that bad lookout and sudden acceleration of speed by the driver and not any act or omission of the plaintiff, were the effective causes of the accident, and continued:] Before further discussing the bearing of regs. 3 and 4 on the duty of care which a pedestrian on a pedestrian crossing owes towards a motor vehicle, a duty which must be broken if the

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defence of contributory negligence is to arise, it is necessary to consider more than one aspect. It will be convenient to take first the submission of Mr. Cartwright Sharp for the defendants that each of those regulations is so "unreasonable"—to use his word—as to make it invalid, even originally when first enacted in conditions of peace, but a fortiori since war and emergency legislation have almost entirely deprived our streets of illumination, and made it very difficult for motor vehicles either to see or be seen. The criterion of such "unreasonableness," as will operate in law to invalidate delegated legislation, was considered and explained in *Kruse v. Johnson* (1) by a Divisional Court of seven judges specially convened by Lord Russell of Killowen C.J. to consider a by-law passed by the Kent County Council for restricting street noises—for example, singing—in a residential area which had been made under the enabling powers of the Local Government Act, 1888. The court (Mathew J. dissenting) held that that by-law was valid. In the judgment of Lord Russell of Killowen, there are two passages which are so relevant that I will quote them fully. In one passage, he said (2): "The question reserved for this court is whether the "by-law is valid. If valid, the conviction is to stand. It is "objected that the by-law is ultra vires, on the ground that "it is unreasonable and therefore bad. It is necessary, "therefore, to see what is the authority under which the "by-law in question has been made, and what are the relations "between its framers and those affected by it. But first it "seems necessary to consider what is a by-law. A by-law, of "the class we are here considering, I take to be an ordinance "affecting the public, or some portion of the public, imposed "by some authority clothed with statutory powers ordering "something to be done or not to be done, and accompanied "by some sanction or penalty for its non-observance. It "necessarily involves restriction of liberty of action by persons "who come under its operation as to acts which, but for the "by-law, they would be free to do or not to do as they pleased. "Further, it involves this consequence—that, if validly made, "it has the force of law within the sphere of its legitimate "operation: see *Edmonds v. Master, etc., of the Company of Watermen and Lightermen* (3)." The second passage is as follows (4): "When the court is called upon to consider the

(1) [1898] 2 Q. B. 91.

(3) (1855) 24 L. J. (M. C.) 124.

(2) Ibid. 96.

(4) [1898] 2 Q. B. 99.

"by-laws of public representative bodies clothed with the
 "ample authority which I have described, and exercising that
 "authority accompanied by the checks and safeguards which
 "have been mentioned, I think the consideration of such
 "by-laws ought to be approached from a different standpoint.
 "They ought to be supported if possible. They ought to be,
 "as has been said, 'benevolently' interpreted, and credit
 "ought to be given to those who have to administer them that
 "they will be reasonably administered. This involves the
 "introduction of no new canon of construction. But, further,
 "looking to the character of the body legislating under the
 "delegated authority of Parliament, to the subject-matter of
 "such legislation, and to the nature and extent of the authority
 "given to deal with matters which concern them, and in the
 "manner which to them shall seem meet, I think courts of
 "justice ought to be slow to condemn as invalid any by-law,
 "so made under such conditions, on the ground of supposed
 "unreasonableness. Notwithstanding what Cockburn C.J. said
 "in *Bailey v. Williamson* (1), an analogous case, I do not mean
 "to say that there may not be cases in which it would be the
 "duty of the court to condemn by-laws, made under such
 "authority as these were made, as invalid because unreason-
 "able. But unreasonable in what sense? If, for instance,
 "they were found to be partial and unequal in their operation
 "as between different classes; if they were manifestly unjust;
 "if they disclosed bad faith; if they involved such oppressive
 "or gratuitous interference with the rights of those subject
 "to them as could find no justification in the minds of reason-
 "able men, the court might well say: 'Parliament never
 "intended to give authority to make such rules; they are
 "unreasonable and ultra vires.' But it is in this sense, and in
 "this sense only, as I conceive, that the question of unreason-
 "ableness can properly be regarded. A by-law is not un-
 "reasonable merely because particular judges may think that
 "it goes further than is prudent or necessary or convenient,
 "or because it is not accompanied by a qualification or an
 "exception which some judges may think ought to be there."
 If it is the duty of the courts to recognize and trust the dis-
 cretion of local authorities, much more must it be so in the
 case of a minister directly responsible to Parliament and
 entrusted by the constitution with the function of administering
 the department to which the relevant field of national activity

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(1) (1873) L. R. 8 Q. B. 118, 124.

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is remitted. Over and above these grounds for trusting to that minister's constitutional discretion is the further consideration that these regulations have to be laid on the table of both Houses, as provided by s. III of the Act of 1930 with which the Act of 1934 is to be read as one, and can be annulled in the usual way.

For the above reasons, this court has, in my opinion, no power to declare these two regulations invalid for unreasonableness, certainly not on any ground submitted in argument before us. The duty of compliance may, even in broad daylight, put on motor traffic a considerable burden of inconvenience, but it is for the minister, and, ultimately, for Parliament, to consider and weigh that drawback, and, if necessary, to amend the regulations under the procedure of the Act. As the regulations stand, they seem to me to rest on the vital importance of safeguarding life and limb, and it is not for the court to do anything but construe their language and apply their provisions, so far as that is in a practical sense possible, without straining their language in order to prevent inconvenience to motor traffic.

As I have already said, the regulations throughout assume visibility. The crossing is to be *seen* by its "indications," the presence or absence of pedestrians *on* the crossing is *observable* by eyesight, whether under reg. 3 or reg. 4. In conditions of visibility I can see no reason why each regulation should not be obeyed in accordance with its tenor, but, if that be the legal effect of the two regulations, the pedestrian who rightly shuns the risks of the open street between crossings and seeks the protection of his sheltered area must surely be absolved in some degree from the insistent duty of care which he owes to motor traffic elsewhere. There is, however, a further aspect over and above the obvious intention to reduce the toll of life which should not be overlooked in construing these regulations. Before attempting to specify the respects in which that duty of care is less inside the sheltered area than outside it, it is worth while recalling the harsh and often cruel bearing of our common law doctrine of contributory negligence on the right of a plaintiff to recover damages for negligence or breach of statutory duty by the defendant. However slightly to blame he may be, however little that blame may contribute to causing the result, if he is in fault and his fault does contribute, the plaintiff recovers nothing. It was in the light of this ancient rule of law that

these regulations were framed, and, in addition, in the great majority of cases where a pedestrian is run into or over by a motor vehicle, the pedestrian gets all the injury and the vehicle little or none. It would, therefore, not be an unreasonable exercise of discretion by the Minister of Transport if he gave his pedestrian plaintiffs some help on the issue of contributory negligence. These considerations are relevant in interpreting any doubtful language in the regulations for the purpose of ascertaining their bearing on the duty of the pedestrian. If a pedestrian were not entitled to walk across the pedestrian crossing without watching all the time to see whether some motorist might not be about to break reg. 3 by not stopping or reg. 4 by not giving him precedence, he might almost as well be walking over the open street. I cannot think that the regulations as a whole make it his duty to be thus *continually* on the lookout, especially as the one positive duty they lay on him is to walk across with all dispatch. If I may take the analogy of the Regulations for Preventing Collisions at Sea, in force all over the world, there is, up to a point, some analogy in the case either of a ship at anchor run into by a ship under way, or of a ship whose duty it is merely to keep her course and speed while the other is under an express duty to give way, and, if possible, to pass under the stern of the first ship. The duty of the ship at anchor, or of the hold-on ship is much less rigorous and exacting than that of the other ship. Primarily, it is to make no change. So, on the pedestrian crossing, I think the duty of the pedestrian is intended to be less *onerous* than if he were crossing the road anywhere outside the crossing. His business is to attend primarily to his own duty of getting across as soon as he can with safety. It was this broad thought that was present to my mind in *Bailey v. Geddes* (1), although I expressed myself in terms that were too universal. If the effect of the statutory code is to relieve the pedestrian *on* the crossing of some of the duties he would owe to the motorist *away* from the crossing, the plea of contributory negligence necessarily has its scope cut down in a case like the present. The reality of the position is that the essential object of the set of regulations was to induce pedestrians to desist from the practice of crossing, anywhere and anyhow, streets which carry much traffic, to the danger of themselves and the inconvenience of the traffic, and the inducement was the provision of sufficient privileged

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crossings where the pedestrian would have the right of way and be officially authorized, and, indeed, invited, to cross without fear of being run over, and free from the burden of anxiety and care involved in having to depend on being perpetually on the look-out for approaching traffic if he wanted to avoid sudden death. This must mean a statutory lightening of his duty of care. In truth, that is what the pedestrian crossing means.

There is judicial authority by analogy for the view which I am expressing, that the stringency—all in favour of the pedestrian—of the statutory duties imposed on the motor driver is, of itself and apart from inferences from the terms of the duty imposed on the pedestrian by reg. 7, a reason for construing the rules as relieving the pedestrian of some of the duties which would lie on him outside the crossing. The present action for damages for breach of the statutory requirements is similar in kind to actions under the Factory or Mines Acts for breach of statutory precautions required by their provisions, such as *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, where Lord Atkin dealt with the nature of the action as follows (1): “The argument is that safety obligations “are placed upon employers for the purpose of protecting not “only workmen who are careful but also those who are careless, “and that the object of the legislature is defeated if the right “to sue for injuries caused by the breach of the safety regu- “lations is denied to the careless workman for whose benefit, “amongst others, the legislation was specially enacted. I “venture to think that this attractive theory does not give “sufficient weight to the true cause of action in such cases. “The statute does not in terms create a statutory cause of “action. It does not, for instance, make the employer an “insurer. The person who is injured, as in all cases where “damage is the gist of the action, must show not only a breach “of duty but that his hurt was due to the breach. If his “damage is due entirely to his own wilful act no cause of action “arises; as, for instance, if out of bravado he puts his hand “into moving machinery or attempts to leap over an unguarded “cavity. The injury has not been caused by the defendants’ “omission but by the plaintiff’s own act. But the injury “may be the result of two causes operating at the same time, “a breach of duty by the defendant and the omission on the “part of the plaintiff to use the ordinary care for the protection

(1) [1940] A. C. 152, 164, 166.

“of himself or his property that is used by the ordinary reasonable man in those circumstances. In that case the plaintiff cannot recover because the injury is partly caused by what is imputed to him as his own default. On the other hand if the plaintiff were negligent but his negligence was not a cause operating to produce the damage there would be no defence. I find it impossible to divorce any theory of contributory negligence from the concept of causation. It is negligence which ‘contributes to cause’ the injury, a phrase which I take from the opinion of Lord Penzance in *Radley v. London and North Western Ry. Co.* (1) I cannot therefore accept the view that the action for injuries caused by breach of statutory duty differs from an action for injuries caused by any other wrong. I think that the defendant will succeed if he proves that the injury was caused solely or in part by the omission of the plaintiff to take the ordinary care that would be expected of him in ‘the circumstances.’ Having laid down the general rules, he then added some observations which have a bearing on what I have been saying: “But having come to that conclusion I am of opinion that the care to be expected of the plaintiff in the circumstances will vary with the circumstances; and that a different degree of care may well be expected from a workman in a factory or a mine from that which might be taken by an ordinary man not exposed continually to the noise, strain, and manifold risks of factory or mine. I agree with the statement of Lawrence J. in *Flower v. Ebbw Vale Steel, Iron and Coal Co., Ltd.* (2), cited by my noble and learned friend Lord Wright (3): ‘I think, of course, that in considering whether an ordinary prudent workman would have taken more care than the injured man, the tribunal of fact has to take into account all the circumstances of work in a factory, and that it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence.’ This seems to me a sensible practical saying, and one which will afford all the protection which is necessary to the workman.” Lord Wright expressed similar views (4): “In my opinion the appellant is right on both points. There is, first, no sufficient evidence that Caswell was guilty of any fault, so as to displace the onus

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(1) (1876) 1 App. Cas. 754.

(3) [1936] A. C. 206, 214.

(2) [1934] 2 K. B. 132, 139, 140.

(4) [1940] A. C. 174.

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“imposed on the respondents by reason of their breach of
 “statutory duty which caused the death, and secondly, the
 “hypotheses relied on by the respondents, if established,
 “would not show that he was guilty of more than an error of
 “judgment or heedlessness or inadvertence in regard to his
 “own safety not amounting to contributory negligence or
 “misconduct such as to displace the claim. On this latter
 “point I adopt as an adequate criterion of what would bar
 “the man’s claim the statement of Lawrence J. in *Flower v.*
Ebbw Vale Steel, Iron and Coal Co., Ltd. (1). He accepted, as he
 “was required to do by the authorities binding him, that
 “contributory negligence was a valid defence to a claim for
 “breach of a statutory duty such as had been committed in
 “that case, but he proceeded to do what I think had not been
 “done previously, i.e., to define a standard to help a jury or
 “a judge to decide whether or not a man had been guilty of
 “negligence in cases of this type. The principle, he said, did
 “not demand of ‘a workman in a factory a higher degree of
 “care than an ordinary prudent workman in a factory
 “would show.’ He proceeded: ‘The question is then
 “whether the plaintiff by the exercise of that degree of care
 “which an ordinary prudent workman would have shown in
 “the circumstances could have avoided the result of the
 “defendants’ breach of duty. I find that he could and
 “that the proximate cause of the accident was his own
 “disobedience of orders . . .’ I note the word ‘proximate,’
 “for the use of which there is support in *Swadling v. Cooper* (2).
 “He added: ‘In considering whether an ordinary prudent
 “workman would have taken more care than the injured man,
 “the tribunal of fact has to take into account all the cir-
 “cumstances of work in a factory, and that it is not for every
 “risky thing which a workman in a factory may do in his
 “familiarity with the machinery that a plaintiff ought to be
 “held guilty of contributory negligence.’” The learned
 Lord dealt very fully with such actions and then said:
 “Contributory negligence involves two elements, negligence
 “and contributing negligence. The policy of the statutory
 “protection would be nullified if a workman were held debarred
 “from recovering because he was guilty of some carelessness
 “or inattention to his own safety, which though trivial in
 “itself threw him into the danger consequent on the breach
 “by his employer of the statutory duty. It is the breach of

(1) [1934] 2 K. B. 132, 139, 140.

(2) [1931] A. C. 1.

"statute, not the act of inadvertence or carelessness, which is "then the dominant or effective cause of the injury. This "follows, I think, if the rules of contributory negligence in "road accident or collision cases are suitably adapted to deal "with breaches by an employer of his statutory duty." In that phrase, "an act of inadvertence or carelessness" which is not the "dominant or effective cause of the injury," he expressed the sort of attitude which, in my view, the court ought to take up in examining the conduct of a pedestrian accused of contributory negligence when actually on a pedestrian crossing.

I have therefore come to the conclusion that, although the learned judge was wrong in treating the dicta contained in *Bailey v. Geddes* (1) as necessarily excluding the question of contributory negligence in all pedestrian crossing cases, the effective, or dominant, or real cause of the accident was the defendant's breach of regs. 3 and 4, that the learned judge arrived at the right conclusion in the present case, and that we ought not to send it back. In my opinion, therefore, the appeal should be dismissed. My brethren think a new trial should be ordered. I recognize that the point on which we differ is not an easy one, but, assuming that I am wrong, to define the just measure of the care owed under the Pedestrian Crossing Regulations by a pedestrian on a crossing to a motorist is not simple, and the proper direction to a jury on that issue would raise some questions of law which are not easy. I have endeavoured to give some guidance on them (2). My brethren offer none. I think the trial judge is entitled to such guidance as we can give him if the case is to go back. The order of the court will be as my brethren think right.

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MACKINNON L.J. The Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, in terms contemplate that the driver of a vehicle as he approaches a crossing (a) can see that it exists, and (b) can see what is on it. Apparently, the regulations have been re-enacted after the time when all street lighting was prohibited and when lights on motors were drastically reduced. It is difficult to understand how the regulations can be reasonably enforced when (a) a driver not

(1) [1938] 1 K. B. 156.

(2) This was partly in observations on the facts of the case which are not reported. The learned lord

justice also strongly urged legislative action to apply the Admiralty rule of proportional responsibility to actions at common law.

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familiar with a particular locality does not know and cannot see that he is approaching a crossing, or when (b) though he does know that he is approaching a crossing (as the defendants' driver did in this case) it is quite impossible for him to see if there is any pedestrian on it. But those considerations need not be explored in this case, having regard to the course of the trial. The judge intimated that he regarded the decision of this court in *Bailey v. Geddes* (1) as laying down a rule of law which bound him. He took that rule of law to be that in any case in which a pedestrian is hit by a motor vehicle within the limits of a crossing, the owners of the vehicle must be liable to pay him damages, and that it is not open to them to plead that there was contributory negligence on the part of the pedestrian. He, therefore, gave judgment for the plaintiff without addressing his mind to the question whether he had been negligent in not observing the lights of the lorry, and not stopping. I am not sure whether all the evidence on this aspect of the case was adduced, having regard to the judge's view of the law, but, in his judgment, he expressly states that he is not considering that question, and that counsel for the defendants, by a respectful nod, has reserved it for future consideration.

I think that the judge was in error in thinking that *Bailey v. Geddes* (1) propounded the suggested rule of law. It is true that there are passages in the judgment of Slessor L.J. which may be thought to do so. Greer L.J. certainly did not propound any such rule of law. His judgment deals solely with the facts of the case, and Scott L.J. in *Chisholm v. London Passenger Transport Board* (2) has stated that he did not do so. The majority of this court in *Chisholm's* case (2) held that in such a claim by a pedestrian the defence of contributory negligence on his part is, as a matter of law, open to the owner of the motor. du Parc L.J. dissented, but he did so on the questions of fact, and I do not understand him as suggesting anywhere that when a claim is based on breach of this regulation no defence of contributory negligence is open to the motor owner as a matter of law. That that defence may be relied on, and, if established on the facts, must defeat the pedestrian's claim, seems to me clear on general principles. The regulation has statutory force. The claim of the pedestrian can be, and is, based on an alleged breach by the motorist of a statutory duty, and may be so

(1) [1938] 1 K. B. 156.

(2) [1939] 1 K. B. 426.

based without specifying negligence on his part, but it seems to be now clearly settled by *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (1), in the House of Lords, that, to a claim for damages for personal injury caused by a defendant's breach of a statutory duty, that defendant may plead that the effective cause of the injury was the plaintiff's negligence, that is, a plea of contributory negligence, and, if he establishes that, the plaintiff will fail in his claim. In the result, I think that Croom-Johnson J. applied a supposed rule of law that was erroneous, and his judgment based thereon must be set aside. As he abstained from considering the suggested defence of contributory negligence because he thought it was not available, and as I do not think the evidence was sufficiently elicited on that question for us to deal with it, I think there must be a new trial of the action. The defendants should have the costs of this appeal, and the costs of the abortive trial should abide the result of the new trial.

I wrote the foregoing on November 9 after the arguments were concluded. I have subsequently read the judgment of Scott L.J., and I have also read the judgment of Goddard L.J. and the addendum to it. I entirely agree with the observations in that addendum. In particular, I welcome the protest against the practice of reporting judgments of this court on questions of fact which are later relied on by counsel as laying down rules of law. There is no more glaring instance of that than *Franklin v. Bristol Tramways* (2). I believe I am recorded in that as saying "I agree." If I had ever dreamed that anyone would think the case worth reporting, and still more if I had thought that anyone would regard it as a precedent, I should certainly have said "I agree in the proposed result. If anyone suggests that the leading judgment lays down any rule of law, so far as I am concerned, I protest against the idea. The observations in that judgment seem to me merely to voice a truism, namely, that when it is pitch dark, everyone on a highway, whether he is driving or walking or riding, must be more alert and exercise more care than he needs to do when there is brilliant sunshine." So far as this case is concerned, for my own part, I think it lays down one rule of law, and only one, namely, that when a plaintiff claims damages for injury caused to him by the defendant's breach of a statutory regulation, the defence of contributory negligence, that is, that the effective cause

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(1) [1940] A. C. 152.

(2) [1941] 1 K. B. 255.

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of the plaintiff's injury was his own negligence, is available to the defendant. If anyone thinks this case is worth reporting when that very proposition has been so clearly laid down in *Caswell's* case (1), I trust that it will only be cited as authority for that proposition and for nothing more.

GODDARD L.J. Two questions arise in this case. The first is whether the lighting regulations have made any difference to the positive duty imposed by the Pedestrian Crossing Regulations if it was impossible for the defendants' driver to see that the plaintiff was on the crossing. The second is whether contributory negligence can be a defence where the accident takes place on a crossing.

On the first question, as the Pedestrian Crossing Regulations have been reissued and laid before Parliament since the lighting regulations were imposed, it must be assumed that it was not intended that the obligations imposed by the former should be affected by the latter, but it is obvious that very considerable difficulties arise in their application, because—more especially in regard to reg. 3—one would suppose that it is contemplated that the driver of a vehicle must be able to see, first, that he is approaching a crossing, and, secondly, whether a pedestrian is or is not on the crossing. Pedestrian crossings have to be indicated by standards on either side and by studs in the road. It may be that the minister is satisfied that the lighting which is permitted on cars is enough to enable a driver to see that he is approaching a crossing. If it is, and he is unable to see whether a pedestrian is on it, it would seem to follow that at every crossing he must approach at a speed that will enable him to stop, if necessary, before he reaches it. In the present case the judge has found that the plaintiff was on the crossing, and the defendants' driver admitted that he knew of the crossing and thought he was on it, but that the plaintiff was beyond it, and it is unnecessary to consider what the position would have been had the driver not known of the presence of the crossing and it had been found that he could not see it. The judge has held that *Bailey v. Geddes* (2) decides that the duty imposed is positive, and gave no finding on the issue of contributory negligence. It was apparently assumed both by counsel and by the learned judge that, in view of that decision, it was not open to argue in the court below that contributory negligence was a defence,

(1) [1940] A. C. 152.

(2) [1938] 1 K. B. 156.

though the point was taken so that it might be argued on appeal.

It has, I think, been generally assumed that *Bailey v. Geddes* (1) did decide that once a breach of the regulations was proved there was no room for a defence of contributory negligence, and that the later decision in *Chisholm v. London Passenger Transport Board* (2), did not turn on contributory negligence but on the fact that, in the circumstances of that case, the driver had not committed a breach of the regulations and so was able to rely on the negligence of the plaintiff. In the former case it is true that two members of the court did say that it was impossible for a defendant who had committed a breach of the regulations to rely on the defence of contributory negligence, but, with respect, when the facts of that case are examined, the passages in the judgments to which I have referred are really obiter. Greer L.J. decided the appeal on the ground that on the accepted facts it was the defendant's negligence that caused the accident, and that there was no evidence of negligence on the part of the plaintiff. He nowhere said that, if there had been contributory negligence, the plaintiff could none the less recover. The other members of the court, I think, took the same view of the facts, and in that case the observations to which I have referred were not necessary for the decision. But, assuming that this court did decide that the negligence of the plaintiff could not be pleaded in answer, such a decision cannot, in my opinion, now be considered correct in view of *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (3). That was a case of breach of statutory duty, and I cannot see that, for this purpose, there is any difference between the duty imposed by one statute and another. Lord Wright defined the action in *Caswell's* case (4) as a common law action based on the statute to protect the workman, and said that it belonged to the category of strict and absolute liability. Here the action is based on a statutory regulation to protect the pedestrian, but it is equally an action on the case, and damage is the gist of the action. So it seems to me that the question for the court is whether the damage was caused by the defendants' breach of the statutory regulation. If it was not, but was caused by the plaintiff's act or default, the defendants are not liable, nor are they if the damage is caused partly by the plaintiff's negligence, if it be an effective cause. Lord Atkin in

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(1) [1938] 1 K. B. 156.

(3) [1940] A. C. 152.

(2) [1939] 1 K. B. 426.

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Caswell's case put it thus (1): "I find it impossible to divorce "any theory of contributory negligence from the concept "of causation you must in the ultimate analysis "be asking who caused the injury." Later, he quoted Lord Ellenborough in *Butterfield v. Forrester* (2): "One person "being in fault will not dispense with another's using ordinary "care for himself." I can find no warrant for differentiating between one class of statutory duty and another for this purpose. If contributory negligence is a defence to a breach of the duty imposed by the Factory Acts for the protection of a limited class, it must be equally a defence where the duty is imposed by the Road Traffic Act and orders made thereunder for the benefit of a wider class, if, indeed, it is right to consider pedestrians as a class, though, I think, they should be regarded as the public generally. This is not to say that negligence ought to be lightly imputed to a pedestrian on a crossing. He is entitled to expect that a driver will obey the regulation, just as a driver or pedestrian is entitled to expect that another driver will keep to his proper side of the road, but it must also be remembered that the lighting regulations have imposed special difficulties on drivers and pedestrians ought to bear in mind that, while they can see the lights of an approaching car, it is far more difficult, and, perhaps, impossible, for the driver to see them. Whether a pedestrian has exercised the degree of care that an ordinary, prudent man would have done in the circumstances is a question of fact, and I hope that courts may no longer hear *Franklin v. Bristol Tramways* (3) cited as though it laid down some rule of law, for, as was pointed out in *Tidy v. Battman* (4), it is wrong that questions which are questions of fact should be confused by importing into them as principles of law a course of reasoning which has been properly applied in deciding other cases on other sets of facts.

Since writing the above I have read the judgment of Scott L.J. and must make some further observations. I agree with him that we cannot treat the order as invalid. [MACKINNON L.J. I also agree with that.] But I cannot agree that we should dismiss the appeal on the ground that, though the learned judge gave no finding on the matter, there was no evidence of contributory negligence. In my opinion, the court cannot lay down any rule or

(1) [1940] A. C. 152, 165.

(3) [1941] 1 K. B. 255.

(2) (1809) 11 East, 60.

(4) [1934] 1 K. B. 322.

set any particular standard for determining whether a plaintiff has been guilty or not of contributory negligence, whether the accident happened on a pedestrian crossing or elsewhere. As I have already said, I think this is a question of fact depending on all the circumstances of the case, and ought not to be treated as one of law. If, to use Lord Atkin's words in *Caswell's* case (1), the injury is the result of two causes operating at the same time, a breach of duty by the defendants and an omission on the part of the plaintiff to use ordinary care for his own protection, he cannot recover. I cannot, for myself, attempt to lay down what may or may not constitute negligence on the part of a plaintiff in regard to a particular class of accident beyond the classic definition of negligence. This is just what is so often contended was done in *Franklin's* case (2), with regard to the duty of foot passengers in the present lighting conditions, yet this court has refused over and over again to treat that case as establishing a rule by which it and courts of first instance are to be bound, and I need not repeat what I quoted earlier in this judgment from *Tidy v. Battman* (3). It is worth remembering that in that case the county court judge and one judge in the Divisional Court thought that they were obliged to find the defendant guilty of negligence because of some observations in previous cases in this court, and it was against this view that Lord Wright, then Master of the Rolls, protested. I think the trial judge should in this case, as in any other, be left to form his own opinion on the facts. The learned judge gave no finding on the matter because he thought he was precluded from doing so, and it is clear from his judgment that counsel did not argue the point, though he left it open, because he had thought the same. In my opinion, there was evidence on which the judge could have found contributory negligence, and this is not a case in which we could have reversed his decision, whichever way he found, had he decided it. A judge who can see and hear the witnesses is in a far better position than we can be to decide the matter, and I think, therefore, that the case should go back for a new trial.

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New trial ordered.

Solicitors for defendants: *Stanley & Co.*

Solicitors for plaintiff: *Mawby, Barrie & Letts.*

(1) [1940] A. C. 152, 165.

(3) [1934] 1 K. B. 322.

(2) [1941] 1 K. B. 255.

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Nov. 19;

Dec. 11.

Deed—Provision for payment of stated amount free of income tax—Assignment of sum out of larger amount sufficient to pay premiums of assurance policies—Finance Act, 1941 (4 & 5 Geo. 6, c. 30), s. 25, sub-s. 1.

Mortgage—Policies of assurance—Covenant by mortgagor to repay premiums—Redemption by person not entitled to immediate equity of redemption—Receipt for money advanced endorsed on mortgage—Transfer to such person of mortgage and benefit of covenant—"Unless it is otherwise expressly provided"—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 115, sub-s. 2.

P., who was possessed of a right to 1574*l.* a year from the life interest of W.L. and also of three policies of insurance on the life of W.L., on an advance to him of 12,000*l.* by the defendants, assigned to the defendants by deed—(1.) out of the yearly payment of 1574*l.*: (a) 480*l.* a year, being 4 per cent. on the sum advanced and (b) such annual sum as after deduction of income tax would suffice to pay the premiums on the three policies; and (2.) the three policies. P. having previously mortgaged his right to 1574*l.* a year and the policies to an assurance society by a mortgage which contained a covenant by P. to pay the premiums on the policies, the defendants at the date of the assignment to them paid to the society the amount then due on the mortgage by P., paying over the balance to P. The society endorsed on the mortgage a receipt for the moneys so paid to them. Thereafter each year the defendants received the 1574*l.* less tax and after a deduction of the payments due to them, namely, 480*l.* less tax and such an amount as after deduction of tax sufficed to pay the premiums on the policies, namely, 420*l.*, handed back the balance to P. and after his death, in 1940, to his executors. In 1941 the defendants deducted the full 420*l.* and the plaintiffs, P.'s executors, claimed that having regard to s. 25, sub-s. 1, of the Finance Act, 1941, the defendants should only have deducted twenty twenty-ninths of 420*l.*, and they brought this action to recover nine twenty-ninths of that sum as being over deducted:—

Held, (1.) that the assignment of the annual sum which after deduction of tax was sufficient to pay the premiums was "a provision . . . for the payment . . . of a stated amount "free of income tax" within the meaning of s. 25, sub-s. 1, of the Finance Act, 1941; (2.) that a counterclaim by the defendants based on s. 114 and s. 115, sub-s. 2, of the Law of Property Act, 1925, to enforce against P. and, after his death, against his executors his personal covenant contained in the mortgage—to pay the full amount of the premiums—failed, since the provision in s. 115, sub-s. 2, that when a stranger pays off a mortgage he becomes the transferee of it and of the benefit of its covenants is expressed to be "unless it is otherwise expressly provided," and the assignment here did provide otherwise, since it was clearly intended so to deal with the rights of the parties as to supersede and cancel

anything which was left of the mortgage in relation to the agreement on the policies of insurance ; (3.) that a counterclaim by the defendants for rectification of the deed of assignment failed, for what had frustrated the intention of the parties was, not the failure of the deed to give effect to their intention, but supervening legislation ; and (4.) that, accordingly, the plaintiffs were entitled to succeed in the action.

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ACTION tried by Asquith J.

In 1935, Arthur Pyke, a solicitor, was possessed of a right to 1574*l.* a year from the life interest of one William Lloyd in the estate of Lord Overstone and three policies of assurance on the life of William Lloyd for 12,000*l.* This yearly payment and the policies had been mortgaged by Arthur Pyke to the Legal and General Assurance Society, Ltd., by a mortgage and two charges and the mortgage contained a covenant by Pyke to pay the premiums on the policies. On an advance to him of 12,000*l.* by the defendants, Pyke executed a deed of assignment, dated July 1, 1935, in which he was described as "the vendor" and the defendants were described as "the purchasers." Para. 1 was in these terms: "The vendor "as beneficial owner hereby grants and assigns unto the "purchasers, first, the net annual sum of 480*l.*" (being 4 per cent. on 12,000*l.*) "part of and to be a first charge upon the "said total annual sum of 1574*l.* to which the vendor is "entitled as aforesaid and to be paid free from all deductions "whatsoever (income tax only excepted) secondly such "further annual sum or annual sums part or parts of the "said last mentioned annual sum of 1574*l.* and ranking as a "charge upon the same *pari passu* with the annual sum of "480*l.* first hereinbefore granted and assigned as after the "deduction of tax therefrom at the rate for the time being "current will amount to the annual sum or annual sums from "time to time due or accruing due and payable in respect of "the premiums upon the said policies of assurance specified "in the second schedule hereto or any of them without any "deduction whatsoever and thirdly all these policies of "assurance mentioned in the second schedule hereto and all "monies assured by or to become payable thereunder respec- "tively and the full benefit of the said policies to hold the "same unto the purchasers absolutely." At the date of the assignment the amount due on the mortgage and charges by Arthur Pyke to the Legal and General Assurance Society, Ltd., namely, 9615*l.* 3*s.* 7*d.* was paid by the defendants to the

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society out of the 12,000*l.* advanced, the balance being paid to Pyke. On redemption of the mortgage a receipt was endorsed thereon by the society for the moneys so paid to them by Arthur Pyke. Thereafter, the defendants received the 1574*l.* each year less income tax, and, after a deduction of the payments due to them, namely, 480*l.*, less income tax, and 420*l.*, free of income tax, the sum required to pay the premiums on the three policies, handed the balance to Pyke, and, after his death on July 8, 1940, to his executors, the plaintiffs. On May 12 and November 12, 1941, the defendants deducted from the payment of 1574*l.*, less income tax, 420*l.* for payment of the premiums on the policies. The plaintiffs now claimed that, having regard to the provisions in s. 25, sub-s. 1, of the Finance Act, 1941 (1), the defendants should have only deducted twenty twenty-ninths of 420*l.*, namely, 289*l.* 13*s.* and they now sued for the balance of nine twenty-ninths, namely, 130*l.* 7*s.* The defendants, by their defence, denied that the second grant in the deed of July 1, 1935, of such "annual sums . . . as after the deduction of tax "therefrom . . . will amount to the annual sum . . . due "and payable in respect of the premiums upon the said policies "of assurance," was a "provision . . . for the payment " . . . of a stated amount free of income tax " within the meaning of s. 25, sub-s. 1. The defendants counterclaimed: (1.) a declaration that on the true construction of the deed they were entitled to retain out of the 1574*l.*, less income tax, a clear sum sufficient to pay the premiums on the policies; (2.) alternatively, rectification of the deed to give effect to the mutual intention of the parties to that effect; and (3.) a declaration that under the covenant of Arthur Pyke contained in the mortgage to the Legal and General Assurance Society,

(1) Finance Act, 1941, s. 25, sub-s. 1: "Subject to the provisions of this section, any provision, however worded, for the payment, whether periodically or otherwise, of a stated amount free of income tax, or free of income tax other than surtax, being a provision which—
 (a) is contained in any deed or other instrument, in any will or codicil, in any order of any court, in any local or personal Act, or in any contract, whether oral

"or in writing; and (b) was made before the 3rd day of September, 1939; and (c) has not been varied on or after that date, shall, as respect payments falling to be made during any year of assessment, the standard rate of income tax for which is ten shillings in the pound, have effect as if for the stated amount there were substituted an amount equal to twenty twenty-ninths thereof."

Ld., the plaintiffs, as executors of Arthur Pyke, were liable to pay the premiums payable on the policies or to pay to the defendants any such premiums paid by them, subject to the defendants repaying or accounting to the plaintiffs for the sums secondly granted by the deed of July 1, 1935.

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F. Grant for the plaintiffs. The second provision in para. 1 of the deed of July 1, 1935, was a "provision . . . for the "payment . . . of a stated amount free of income tax" within the meaning of s. 25, sub-s. 1, and s. 27 of the Finance Act, 1941.

Geoffrey Cross for the defendants. The assignment in the deed of July 1, 1935, of such "annual sums . . . as after "the deduction of tax therefrom at the rate for the time being "current will amount to the annual sum . . . from time to "time due . . . and payable in respect of the premiums "upon the said policies of assurance" is not "a provision for the "payment," within s. 25, sub-s. 1, of any sum. This assignment lies in grant and not in covenant. There was no provision for payment by Pyke or by anyone; there was simply a grant of property. In the deed, Arthur Pyke is described as the vendor and the defendants as the purchasers, and the provisions in s. 25, sub-s. 1, do not touch the purchase outright of an item of property. Further, the defendants were paid the total yearly sum of 1574*l.*, less income tax out of which they themselves deducted, first, the 480*l.* less income tax, and then the sum required to pay the insurance premiums. Sect. 25, sub-s. 1, contemplates that there shall be a payor as is shown by sub-s. 4 which speaks of cases in which "the "relations of the payee and payor are such that the payee "is accountable to the payor for so much of any relief from "income tax which he receives as is ascribable to the payment." So, there being no identifiable payor, there was no "payment" within the meaning of the sub-section. It is clear from the terms of the sub-section that it was never intended to apply to a transaction of such a character as that between Arthur Pyke and the defendants. If this grant and assignment is held to come within the terms of s. 25, sub-s. 1, the defendants are entitled to succeed on their counterclaim for rectification of the deed of July 1, 1935, that it may provide for payment of the premiums on the policies out of the annual sum of 1574*l.*: *Burroughes v. Abbott* (1) and *Jervis v. Howle*

(1) [1922] 1 Ch. 86.

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and *Talke Colliery Co., Ltd.* (1). Alternatively, the defendants ask for a declaration that the benefit of the personal covenant of Arthur Pyke, contained in the mortgage and charges to the Legal and General Assurance Society, Ltd., to pay the premiums on these policies has been transferred to them. The defendants, therefore, can call on the plaintiffs, as the executors of Arthur Pyke, to pay the premiums. When the defendants redeemed the mortgage and charges of the Legal and General Assurance Society, Ltd., a receipt for the moneys paid to that society was endorsed on the mortgage. By s. 115, sub-s. 2, of the Law of Property Act, 1925: "where by the receipt, the money appears to have "been paid by a person who is not entitled to the immediate "equity of redemption, the receipt shall operate as if the "benefit of the mortgage had, by deed, been transferred to "him, unless (a) it is otherwise expressly provided . . ." And by s. 114 there was transferred to the defendants "the benefit "of and the right to sue on all covenants with the mortgagee." As from July 1, 1935, the defendants have been entitled to enforce this covenant against Arthur Pyke and, after his death, against his executors.

F. Grant in reply. It is plain that by the second grant of the deed of July 1, 1935, there is each year "a payment" to the defendants which is paid by Arthur Pyke or certain trustees. Someone pays the money, and there is in fact a payment. The claim for rectification is bad, for the deed of July 1, 1935, carried out with exactitude the intention of the parties. "It is always necessary for a plaintiff to show "that there was an actual concluded contract antecedent to "the instrument which is sought to be rectified; and that "such contract is inaccurately represented in the instrument": per Sir W. M. James V.-C., in *Mackenzie v. Coulson* (2). The two cases cited for the defendants on this issue are irrelevant. [*Fredensen v. Rothschild* (3) was also mentioned.] On the counterclaim that the defendants are entitled to the benefit of Arthur Pyke's personal covenant in the mortgage and charges, now redeemed, to pay the premiums on the three policies, it may well be asked, if this were so, what was the use of the second grant in para. 1 of the deed of assignment? There are three answers to this contention. First, for s. 115, sub-s. 2, of the Law of Property Act, 1925, to apply, the

(1) [1937] Ch. 67.

(3) [1941] 1 All E. R. 430.

(2) (1869) L. R. 8 Eq. 368, 375.

money for which the receipt was given must appear "to have been paid by a person who is not entitled to the immediate equity of redemption." Here the receipt for the mortgage moneys and the assignment to the defendants bear the same date. Presumably, the 12,000*l.* was paid over to the Legal and General Assurance Society, *Ld.*, and to Arthur Pyke against the handing over of the executed assignment and the two acts were contemporaneous, in which case the defendants were entitled to the immediate equity of redemption when the receipt was given. Therefore the provisions of s. 115, sub-s. 2, do not apply. Secondly, s. 115, sub-s. 2, is only applicable "unless it is otherwise expressly provided," but Arthur Pyke made the assignment of July 1, 1935, as "beneficial owner," that is, the benefit of the mortgage and charges was not to be transferred. This result follows also from the second grant in the assignment that Arthur Pyke would pay to the defendants out of the 1574*l.* a net annual sum equal to the full amount of the premiums on the policies. The assignment expressly provided that the mortgage and charges were not transferred and the parties, therefore, otherwise expressly provided. If it were not so, the second grant in the assignment would have been surplusage. Thirdly, if neither of the first two points is good and the mortgage and charges are still in existence, the defendants by virtue of the assignment have purchased the equity of redemption in the policies and are liable to indemnify the plaintiffs against their obligations under the mortgage and charges, that is, against the payment of the premiums: *Waring v. Ward* (1); *Mills v. United Counties Bank, Ld.* (2); and *Bradford v. Gammon* (3).

Geoffrey Cross in reply on the counterclaim. The fact that there is no antecedent contract does not preclude rectification: *Banks v. Ripley* (4). The defendants did not purchase the whole of the equity of redemption, but a vested part thereof remained in Arthur Pyke. Further, on the application of s. 115, sub-s. 2, "it was not otherwise expressly provided." There is no statement in the deed of assignment that the mortgage and charges had been cancelled and superseded.

Cur. adv. vult.

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(1) (1802) 7 Ves. 332.

(2) [1912] 1 Ch. 231.

(3) [1925] Ch. 132.

(4) [1940] Ch. 719.

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parties arising on the claim and defence, as opposed to the counterclaim, arises on the second of the three grants contained in the deed of assignment of July 1, 1935. It was clearly the object of the parties, so far as the 1574*l.* per annum was concerned, that after the defendants had taken thereout 480*l.* per annum, that is four per cent. on 12,000*l.*, less income tax, the defendants should further obtain from the same source a sum, clear of income tax, of 420*l.* a year, an amount necessary to pay the premiums on the policies of assurance. The defendants wanted 480*l.* a year, less tax, during William Lloyd's life, and when, as in the course of nature was inevitable, he should die they wanted their capital of 12,000*l.* back in full, and this they would get by reason of the assignment to them of the policies on his life. This, however, they would not get unless those policies were maintained by the regular payment meanwhile of the premiums, and neither they nor, as I find, Arthur Pyke, intended them, the defendants, to have to find out of their own pockets any part of these premiums. I am satisfied that this was the intention of both parties at the time the deed of assignment was executed. Unfortunately, two events unexpectedly supervened. In the first place, the rate of income tax, which in 1935 was 4*s.* 6*d.* in the pound, rose in 1940/1941 to 10*s.* in the pound, and, secondly, s. 25, sub-s. 1, of the Finance Act, 1941, was passed. The plaintiffs' sole claim is that s. 25, sub-s. 1, of that Act applies to the assignment by Arthur Pyke to them of a sum sufficient to pay those premiums—420*l.*—and that its effect is that during and since 1941 the defendants are entitled no longer to such a sum annually as after deduction of income tax at the current rate of 10*s.* in the pound would amount to 420*l.* a year, but only to such an annual sum as after such deduction would amount to twenty twenty-ninths of 420*l.* a year. Since the plaintiffs have paid during 1941 at the unreduced rate, they claim to be entitled, on the basis of twenty twenty-ninths of 420*l.*, to a refund which amounts to 130*l.* 7*s.* The plaintiffs are entitled to succeed, subject to the counterclaim, if they can establish that by virtue of the assignment there is a "provision . . . for the payment . . . of a stated amount free of "income tax," because all the other conditions laid down in s. 25, sub-s. 1, are satisfied. The provision is contained in a deed. The deed was made before September 3, 1939, and it has not been varied since that date. It is further conceded, as I understand, that the 420*l.* is a "stated amount free of income tax."

Therefore, the only outstanding questions are whether there is a "provision" and, if so, whether it is a provision for the payment of the amount in question. I hold that there is such a provision, notwithstanding Mr. Cross's ingenious and most lucid argument for the defendants on this and the other issues. The object of the assignment, no doubt, was that the defendants should receive out of the 1574*l.* (inter alia) an annual clear sum of 420*l.* free of income tax, and they could not receive this sum, in my view, without being paid it. It seems to me to be immaterial that they were paid the whole of the 1574*l.* and collected what was due to them under the assignment out of it, handing over the balance to Mr. Pyke. That does not prove it was not a payment. The payment to the defendants, as a matter of arrangement, of the larger sum was relied on by Mr. Cross as showing that there was no identifiable payor of the smaller sum of 420*l.* which was carved out of it, and he argued that such a payor there must be or there could be no payment, and he relied in particular on sub-s. 4 of s. 25 of the Finance Act, 1941, in support of this argument, because, he said, it must be implied from the opening words of that sub-section—"If, in the case of a payment to which "sub-s. 1 of this section applies, the relations of the payee and "payor are such that the payee is accountable to the payor ". . . ."—that in every case falling within sub-s. 1 there must be an identifiable payor. In my view, the sub-section contemplates the existence of a specific payor as being normal, but not as a necessary or invariable incident in cases within sub-s. 1. I, therefore, hold that the fact that it is impossible to point to a specific payor does not operate to exclude a case from sub-s. 1. Sub-sect. 1 does not refer to a payor. It only refers to a payment. In any case, there is, in my opinion, no such impossibility in the present case. The payor of the larger sum could, in my view, be described without material inaccuracy as the payor of the smaller sum which by arrangement was deducted thereout and retained by the defendants. But, if there can be shown to be a payment, we can desist from the search, vain or successful, for a payor.

To the argument that there is a provision for the payment of 420*l.*, Mr. Cross further objected that an out-and-out assignment of income is not a provision for payment of anything within the meaning of the sub-section. The words of the material provision, he says, are words of grant and not of covenant. The view which appeals to me as the common

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sense view is that one who assigns part of his income is making provision for the payment of that part of his income to another person. Hence, on the claim, which involves one head of the counterclaim, I hold in favour of the plaintiffs.

There remain two heads of counterclaim, and under the first of these the defendants claim rectification of the assignment. There is no doubt that the assignment has, in consequence of events subsequent to it, not operated according to the common intention of the parties to it, but to support a claim to rectification it must be shown, at the very least, that the instrument, rectification of which is sought—in this case the assignment—did not give effect to that common intention as it existed before the assignment. It seems to me that that condition is not fulfilled. What has frustrated the intention of the parties is not the failure of the instrument to give effect to that intention—the assignment did give precise effect to it—but supervening legislation which has driven a coach and six through both the intention of the parties and the instrument itself. If there is a written contract which accurately gives effect to the agreement or common intention of the parties, the fact that a statute, passed later, in effect provides that that intention shall be frustrated and that the instrument shall not operate according to its tenor, seems to afford no ground for rectification; and on this short ground I hold that the claim for rectification fails.

The last head of the counterclaim is based on the mortgage, and, as I understand it, the argument proceeds by the following steps. (1.) The defendants under the assignment of 1935 redeemed Pyke's mortgage to the Legal and General Assurance Society, Ltd.; (2.) when this occurred a receipt was in fact endorsed on the mortgage by the Legal and General Assurance Society, Ltd., of the moneys paid by Pyke; (3.) s. 115, sub-s. 2, of the Law of Property Act, 1925, provides "that where by "the receipt, the money appears to have been paid by a person "who is not entitled to the immediate equity of redemption, "the receipt shall operate as if the benefit of the mortgage "had by deed been transferred to him; unless (a) it is otherwise "expressly provided"; (4.) by s. 114, sub-s. 1, of the Law of Property Act it is provided that: "A deed executed by a "mortgagee purporting to transfer his mortgage or the benefit "thereof shall, unless a contrary intention is therein expressed, "and subject to any provisions therein contained, operate to "transfer to the transferee (b) the benefit of and

"the right to sue on all covenants with the mortgagee"; (5.) ergo, the defendants as from July 1, 1935, the date of the assignment, became entitled to enforce against Pyke, and now against the executors, his personal covenant in the mortgage to pay the full amount of the premiums, and this full amount is 420*l.* clear; and (6.) they are still so entitled now, and if the plaintiffs' claim for recovery of this 130*l.* 7*s.* holds, by reason of s. 25, sub-s. 1, of the Finance Act, 1941, the defendants are entitled to recover it from Pyke's personal representatives as transferees of the mortgage. The argument for the plaintiffs on this point was three-fold, but I need only mention one of the three limbs: s. 115, sub-s. 2, of the Law of Property Act, provides that when a stranger pays off the mortgage he becomes the transferee of it and of the benefit of its covenant, "unless it is otherwise expressly provided." It seems to me that the assignment in this case provided otherwise. It was, I think, so intended to deal with the rights of the parties as to supersede and cancel anything which was left of the mortgage in relation to the agreement on the policies of assurance. It dealt with the sum derivable from the 1574*l.* covered by the mortgage in a way which, after the Finance Act, 1941, had been promulgated, gave the defendants less than a clear 420*l.* per annum, and to that extent, in my view, it modified and reduced the rights of the defendants as transferees of the mortgage. The other two limbs of the plaintiffs' argument under this head seem to me, though highly technical, to be sound, but I prefer to decide this point on the limb I have dealt with. It follows that the plaintiffs are entitled to judgment on the claim and counterclaim, in each case with costs to be paid out of the trust funds.

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Judgment for the plaintiffs.

Solicitor for plaintiffs: *Arthur Pyke & Co.*

Solicitors for defendants: *Hugh-Jones & Flinn.*

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Nov. 23, 24,

25, 26, 27,

30 ;

Dec. 1, 2, 3,

4, 11.

ARBON *v.* ANDERSON AND OTHERS.DE LAESOE *v.* ANDERSON AND OTHERS.

Prison—Treatment of prisoners—Breach of Prison Rules, 1933—Breach of instructions in Command Paper for treatment of persons detained under Defence (General) Regulations, reg. 18(B)—Action by prisoner against Home Secretary and governors of prison—Competence—Prison Rules, 1933 (St. R. & O., 1933, No. 809).

The plaintiffs, who were detained under reg. 18(B) of the Defence (General) Regulations, 1939, brought actions against the Home Secretary and the governors of the prisons in which they were or had been detained, alleging that they had suffered damage by reason of the breach of statutory duty of the defendants (1.) in failing to comply with instructions for the treatment of prisoners laid down in Command Paper, 6162, issued in January, 1940, by the Home Secretary, and (2.) by reason of breaches of the Prison Rules, 1933, applying to prisoners under remand or awaiting trial which were made applicable by the Command Paper to persons detained under the regulation :—

Held, that the Command Paper contained nothing more than administrative departmental instructions which would not confer any right of action on a prisoner even if they had been wilfully disobeyed by the prison governors, and that neither the Prison Act, 1898, nor the Prison Rules made thereunder conferred rights enforceable by action on prisoners who had suffered inconvenience or detriment by reason of a departure from the rules.

ACTIONS tried by Goddard L.J., sitting as an additional judge of the King's Bench Division.

The plaintiffs, F. Arbon and H. H. A. de Laessoe, were detained under orders made on June 7 and May 23, 1940, by the first defendant, Sir John Anderson, the Home Secretary, under reg. 18(B) of the Defence (General) Regulations, 1939, in various prisons of which the third and subsequent defendants were the governors. The actions were brought against the first defendant and his successor in office, the second defendant, Mr. Herbert Morrison, and the governors of the prisons in respect of the treatment the plaintiffs alleged that they had received, while detained, as the result of alleged breaches of statutory duty on the part of all the defendants. The breaches relied on related (1.) to the failure of the defendants to comply with the instructions with regard to the treatment in prison establishments of persons detained under the regulation, contained in Command Paper, 6162,

issued in January, 1940, by the first defendant in pursuance of the authority conferred on him by reg. 18(B), para. 8, and (2.) to alleged breaches of the Prison Rules, 1933, applicable to prisoners under remand or awaiting trial made under the Prison Act, 1898, which, by the Command Paper, were made to apply to the treatment of persons detained under reg. 18(B). The defendants pleaded that they were under no statutory duty to the plaintiffs, and that there had been no breach by them of any such duty.

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G. O. Slade, Aiken Watson and J. W. Williamson for the plaintiffs.

Sir Donald Somervell A.-G., Sir David Maxwell Fyfe S.-G., and Valentine Homes for the defendants.

Cur. adv. vult.

1942. Dec. 11. GODDARD L.J. read a judgment in which he held on the facts that, so far as there had been any serious departures from the instructions contained in the Command Paper, they were known to, and must be assumed to have been approved by, the Home Secretary, and that there had been no breach of the Prison Rules, and continued: I now turn to the law. In my opinion, the Command Paper contains nothing more than administrative departmental instructions which do not, and are not intended to, confer any rights on prisoners and cannot do so. There is no obligation on the Secretary of State to communicate them to Parliament, still less to the prisoners. They can be altered or withdrawn at any time. I cannot agree with Mr. Slade's contention that I ought to treat them as though they were set out in full in the Defence Regulations. That would be equivalent to saying that they were imposed by Order in Council with the consequence that, if Parliament disapproved of them, they would be subject to a resolution that they be annulled under s. 8, sub-s. 2, of the Emergency Powers (Defence) Act, 1939, but that, if not annulled, they would have the force of a statute. It is, however, clear, in my opinion, that the matter is left, by para. 8 of the regulation, to the discretion of the Secretary of State. The instructions, as I say, can be altered or withdrawn at any time. I cannot see how it can be said that any statutory duty vis-à-vis the prisoners was created by the

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Command Paper, or that they could acquire any cause of action under it even if there had been a wilful disregard of the instructions by the governors.

With regard to the Prison Rules, it would be enough to say that there were no breaches, but, in case a higher court should take a different view, I should say that, in my opinion, neither do these rules confer rights on prisoners which can be enforced by action. They are made under the Prison Act, 1898, s. 2, for the "government of prisons." I think it unnecessary to review the long series of cases which deal with the question whether the breach of a duty imposed by statute confers a right of action on an individual. The question depends on the scope and language of the Act which creates the obligation and on considerations of policy and convenience: per Lord Macnaghten in *Passmore v. Oswaldtwistle Urban Council* (1). Whether the Act provides for a penalty or whether some special tribunal is set up to deal with matters arising under the Act are matters, no doubt, to be taken into account in determining whether a cause of action is also given, and either may be the determining factor, but neither the presence nor the absence of such a provision is conclusive. The real question which falls to be determined is whether it is intended by the statute to confer an individual right. I am clearly of opinion that neither the Prison Act, 1898, nor the rules were intended to confer any such right.

It is significant that there is no trace of any action based on alleged breaches of prison rules ever having been brought in this country unless *Cobbett v. Grey* (2) and *Osborne v. Milman* (3) are to be so regarded, although, in my opinion, they are distinguishable. The former case related to imprisonment in the wrong place. Under a rule having the force of statute different parts of prisons were set apart for the imprisonment of debtors of different categories. The plaintiff being in one of those parts was—it was assumed wrongly—removed by the warden of the prison to another and worse place of detention, and this was held to be a trespass in spite of a somewhat vigorous dissent by Pollock C.B. In *Osborne v. Milman* (3), the plaintiff was imprisoned in Holloway Gaol and treated as a criminal prisoner. He contended that he was imprisoned on civil process, and, therefore, ought to have been treated as a first class

(1) [1898] A. C. 397.

(2) (1849) 4 Ex. 729.

(3) (1886) 17 Q. B. D. 514.

misdemeanant which is the only form of imprisonment that can be imposed on a prisoner on civil process. Denman J. decided in his favour and awarded him damages. This decision was reversed on appeal on the ground that the prisoner was properly treated as a criminal prisoner, though, obviously, if the court had thought that he should have been treated as a civil prisoner, the judgment would have been upheld. But both these cases relate to the nature of the imprisonment. Here the prisoners were lawfully imprisoned and the questions relate to the conditions of their imprisonment. The nearest case is to be found in *Gibson v. Young* (1). It was there held that no action lay against the government at the suit of a prisoner for damages for injuries caused by the negligence of a prison officer. The basis of the decision is public policy, and the reasoning is directly applicable to the present case. While I do not think it necessary to decide whether, if a person sustains personal injury through an act of negligence of a prison officer, he can bring an action, it seems to me impossible to say that, if he can prove some departure from the prison rules which caused him inconvenience or detriment, he can maintain an action. It would be fatal to all discipline in prisons if governors and warders had to perform their duty always with the fear of an action before their eyes if they in any way deviated from the rules. The safeguards against abuse are appeals to the governor, to the visiting committee, and finally to the Secretary of State, and those, in my opinion, are the only remedies.

So, even if there were proof here that the prison rules had been broken, I should still hold that no cause of action thereby accrued to the plaintiffs. The actions, therefore, fail and are dismissed, with costs.

Judgment for defendants.

Solicitors for plaintiffs: *Oswald Hickson, Collier & Co.*

Solicitor for defendants: *Treasury Solicitor.*

(1) (1900) 21 N. S. W. L. R. 7.

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Dec. 8, 11. *Practice—Setting aside order—Inherent power of court—Order a nullity*
—No service of summons.

A person who is affected by an order of the court which can properly be described as a nullity is entitled *ex debito justitiae* to have it set aside. Failure to serve process where service of process is required renders null and void an order made against the party who should have been served. The court can set aside such an order in its inherent jurisdiction and it is not necessary to appeal from it.

Quaere, whether an appeal from such an order, assuming it to be made in proper time, would be competent.

APPEAL from Croom-Johnson J.

On January 18, 1940, the plaintiff was granted an order giving him leave under the Courts (Emergency Powers) Act, 1939, to proceed to the enforcement of a judgment which he had obtained against the defendant on January 12, 1937. The order of January 18, 1940, was obtained on an affidavit of service on the defendant which stated that the deponent had served on the defendant a true copy of the summons asking for the order by posting it in a prepaid envelope addressed to the defendant at an address which was alleged to be that of the defendant's place of business and residence. The address stated was not the address for service given in the action, and the defendant was not residing or carrying on business at the stated address and he never received the summons. On or about September 27, 1941, the defendant first learned that the order had been made. On September 23, 1942, he took out a summons asking that the order should be set aside, the grounds given for the application being that no summons for leave to enforce the judgment had been served on him as required by the Rules of the Supreme Court. On October 12, 1942, the master made an order that the order of January 18, 1940, should be set aside. The plaintiff appealed. Croom-Johnson J. took the view that, if the application was made under r. 1, of R. S. C., Or. LXX (1), the procedure adopted was not correct, the only way of getting the order set aside under that rule being, not by application to the master, but by an

(1) By R. S. C., Or. LXX., r. 1: "of practice for the time being in
 "Non-compliance with any of "force, shall not render any
 "these rules, or with any rule "proceedings void unless the court

Reported by F. R. R. Burford, Esq., Barrister-at-Law.

appeal from the order for which leave would have had to be obtained to appeal out of time. It was also submitted to him that, quite apart from Or. LXX., r. 1, the defendant was entitled to have the order set aside *ex debito justitiae* as a nullity. With regard to that, Croom-Johnson J. held that no such argument could be entertained, on the ground that the summons, which he interpreted as being confined to an application based on an irregularity under Or. LXX., r. 1, did not ask for any such relief, and in his discretion, he refused leave to amend. The defendant appealed.

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Gallop for the defendant. The order of January 18, 1940, ought not to have been made, for it was obtained on a summons which was never served on the defendant. It ought, therefore, to be set aside under R. S. C., Or. LXX., r. 1, on the ground that it was made irregularly. The application to set aside must be made within a reasonable time: Or. LXX., r. 2; and the defendant, in the circumstances, has complied with that condition. There is no direct authority on the point, but a judgment by default will be set aside for irregularity under Or. XXVII., r. 15. [He referred to *Hamp-Adams v. Hall* (1).] Alternatively, the order was a nullity, and the court should set it aside in exercise of its inherent jurisdiction: *Fishmongers' Company of the City of London v. Donnington Finance Co.* (2). In *Anlaby v. Praetorius* (3), a judgment which had been obtained in default of defence was set aside *ex debito justitiae*. In the present case there was also a vital defect in the order.

Raeburn for the plaintiff. This is not a case where the court would be justified in exercising its inherent jurisdiction and setting aside the order. *Fry v. Moore* (4); *Hewitson v. Fabre* (5). [LORD GREENE M.R. referred to *Smurthwaite v. Hannay* (6).] In regard to the question of irregularity, the master was not entitled to set aside the order of January 18, 1940. The defendant's proper remedy was by way of appeal: *In re St. Nazaire Co.* (7); *Preston Banking Co. v. William Allsup and Sons* (8). There is no authority which could justify

"or a judge shall so direct, but
"such proceedings may be set
"aside either wholly or in part as
"irregular, or amended, or other-
"wise dealt with in such manner
"and upon such terms as the
"court or judge shall think fit."

(2) [1941] W. N. 17.

(3) (1888) 20 Q. B. D. 764.

(4) (1889) 23 Q. B. D. 395.

(5) (1888) 21 Q. B. D. 6.

(6) [1894] A. C. 494.

(7) (1879) 12 Ch. D. 88, 101.

(8) [1895] 1 Ch. 141.

(1) [1911] 2 K. B. 942.

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the setting aside of the order of January 18, 1940, by the master, and the reversal of his decision by Croom-Johnson J. should be upheld by this court.

LORD GREENE M.R. On the view which I take of this case, it is not necessary to discuss in detail the arguments which have been addressed to us on the basis that the failure to serve the defendant was a mere irregularity. Had that been the true view of the case, we should have had to consider whether Croom-Johnson J. was right in deciding that the only method of attacking the order was by way of appeal, and if not, whether in all the circumstances the defendant ought to have relief under Or. LXX. I express no opinion on that question. The second argument was more serious in its nature. It was that the order was a nullity, and that, therefore, the defendant was entitled to have it set aside *ex debito justitiae* irrespective of Or. LXX., r. 1. Before I go more closely into that matter, it is desirable to examine the distinction between proceedings or orders which are nullities and those in respect of which there has been nothing worse than an irregularity. No definition is to be found in the rule which draws a line between these two classes. Exactly where that line lies may not be easy to discover in some circumstances. The existence of the distinction, however, has been recognized in many authorities.

The first case to which I need refer is *Smurthwaite v. Hannay* (1). A number of plaintiffs had been joined in the action, the causes of action of the several plaintiffs were separate and distinct, and, accordingly, there was no authority for the joinder, but it was argued that the misjoinder was a mere irregularity and that, as the application (which was an application to stay the action) had not been made within a reasonable time, the action ought not to be stayed. Dealing with that contention Lord Herschell L.C. said (2): "I cannot accede to the argument urged for the respondents, that even if the joinder of the plaintiffs in one action was not warranted by the rule relied on, this was a mere irregularity of which the defendants, by virtue of Or. LXX., could not now take advantage. If unwarranted by any enactment or rule, it is, in my opinion, much more than an irregularity": and Lord Russell of Killowen, said (3): "This objection is not, in my judgment, well founded.

(1) [1894] A. C. 494.

(2) *Ibid.* 501.

(3) *Ibid.* 506.

"In my judgment, such joinder of plaintiffs is more than an irregularity ; it is the constitution of a suit as to parties in a way not authorized by the law and the rules applicable to procedure ; and apart altogether from any express power given by the rules, it is fully within the competence of the court to restrain and to prevent an abuse of its process." In Daniell's Chancery Practice, 8th ed., vol. i., p. 708, it is stated : " A judgment may also be set aside for irregularity. If the irregularity consists in non-compliance with one of the rules, the court or a judge may either set it aside, or amend or otherwise deal with it in such manner and upon such terms as the court or judge may think fit." After referring to Or. LXX., r. 1, the author then proceeds : " A judgment obtained by some step not warranted by the rules, or capable of being sanctioned, is wholly void and must be set aside," and he cites *Smurthwaite v. Hannay* (1). Later, in referring to the need to show that an application under Or. LXX. is made promptly, he says : " The . . . provision only applies where the irregularity is capable of being waived under Or. LXX., r. 1, but where the proceedings are wholly void, they may be set aside at any time. In such a case no defence need be shown, but it is otherwise where the court has a discretion as to setting aside." He cites for that *Hamp-Adams v. Hall* (2), and continues : " Where a judgment against a party has been signed irregularly, it is worse than a mere non-compliance with the rules, and he is entitled *ex debito justitiæ* to have it set aside, and the court has no power to impose terms upon him, except as a condition of giving him his costs."

To return to the authorities, the matter was fully discussed in *Anlaby v. Praetorius* (3). It is true that there judgment had been obtained in default of defence, but the reasoning of the court was of general application and not based on any special rule relating to default judgments. Fry L.J. said (4) : " It follows that the defendant had ten days from the delivery of the statement of claim, or from the time limited for appearance, within which to deliver his defence ; and as the writ was served on January 21, and the time limited for appearance was January 28, the last day for delivering the defence was ten days from January 28, and the judgment entered on February 7 was premature and irregular. In

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(1) [1894] A. C. 494.

(3) 20 Q. B. D. 764.

(2) [1911] 2 K. B. 942.

(4) Ibid. 768.

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"such a case the right of the defendant to have the judgment set aside is plain and clear. The court acts upon an obligation; the order to set aside the judgment is made ex debito justitiae, and there are good grounds why that should be so, because the entry of judgment is a serious matter, leading to the issue of execution, and possibly to an action of trespass. We were pressed with the argument that Or. LXX., r. 1, gives a discretion to the court which applies here But in the present case we are not concerned with an instance of non-compliance with a rule, nor with an irregularity in acting under any rule. The irregular entry of judgment was made independently of any of the rules; the plaintiff had no right to obtain any judgment at all. I do not think, therefore, that the case comes within r. 1, and we must consider what is the right practice without reference to that rule. There is a strong distinction between setting aside a judgment for irregularity, in which case the court has no discretion to refuse to set it aside, and setting it aside where the judgment, though regular, has been obtained through some slip or error on the part of the defendant, in which case the court has a discretion to impose terms as a condition of granting the defendant relief. But although the court is bound to set aside an irregular judgment ex debito justitiae, it has always exercised a discretion as to costs, and has imposed terms as a condition of the exercise of that discretion—a common term being that the defendant shall not bring any action." Lopes L.J. said (1): "I entirely agree that Or. LXX., r. 1, does not apply here. It was meant to apply where a party had made some blunder in his proceedings, as by delivering a pleading too late; but the present case seems to me altogether outside the operation of r. 1, because the judgment was entered prematurely, without any right whatsoever. To obtain that judgment was a wrongful act, and not an act done within any of the rules. The defendant is, therefore, entitled ex debito justitiae to have it set aside." In *Hughes v. Justin* (2), the parties had come to an agreement after the issue of the writ and as a result a payment had been made, but, in spite of that, judgment was signed for the full amount claimed. It was held that the case fell within the class referred to in *Anlaby v. Praetorius* (3); and the defendant had a right ex debito justitiae to have the

(1) 20 Q. B. D. 770.

(3) 20 Q. B. D. 764.

(2) [1894] 1 Q. B. 667.

judgment set aside. In *Hewitson v. Fabre* (1), the defendant, who was not a British subject, had been served out of the jurisdiction with the writ instead of with notice of the writ as the rules provide, and it was held, by Field J. and Wills J., that there had been no service and the proceedings were void ab initio. *Hamp-Adams v. Hall* (2) was another case of default in appearance, but it appears to have been treated, not as a mere exercise of jurisdiction under the rules relating to default, but as an exercise of an inherent jurisdiction in the court. The writ was served, but the date of service was not endorsed on it within three days as required by the rules. The plaintiff signed judgment in default of appearance and a verdict for damages was given by a sheriff's jury. It was held that non-compliance with the rule which required due endorsement of the date of service was not an irregularity which could be waived, and that the plaintiff, not having complied with the rule, was not entitled to proceed by default and the verdict and judgment must be set aside. Vaughan Williams L.J. said (3): "It is contended for the plaintiff that the non-compliance with the rule has been waived by the defendant. In my opinion it was impossible for the defendant to waive the defect, for the result of the non-compliance with the rule was that there was no writ on which the plaintiff was entitled to proceed. Then it was said that at the most the case should be regarded as one in which there has been a mere irregularity, and Or. LXX., r. 2, was called to our attention as shewing how the right of a party to take advantage of a defect in the nature of an irregularity may be limited or taken away. In my opinion that rule has no application to the circumstances of the present case. It is said that it is a very severe penalty to put on a mistake of this kind that all the subsequent proceedings should be set aside. I am not at all impressed by that argument. Where proceedings are taken by a plaintiff in the absence of the defendant it is most important that there should be at every stage a strict compliance with the rules, and therefore it is a reasonable and proper thing in the case of proceedings by default to treat non-compliance with such a rule as Or. IX., r. 15, not as a mere irregularity which can be waived, but as a matter which prevents any further proceedings from being taken on the writ." The difficulty of

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(1) 21 Q. B. D. 6.

(2) [1911] 2 K. B. 942.

(3) Ibid. 943.

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defining the precise line which separates an irregularity from a defect which makes the order a nullity is referred to in *Fry v. Moore* (1). There Lindley L.J. said (2): "But then arises the question, whether the order for substituted service was a nullity, rendering all that was done afterwards void, or whether it was only an irregularity. If it was the latter, it could be waived by the defendant. I shall not attempt to draw the exact line between an irregularity and a nullity. It might be difficult to do so. But I think that in general one can easily see on which side of the line the particular case falls, and in the present case it appears to me that the proceeding was rather an irregularity than a nullity. The writ was properly issued, but it was improperly served, and I am not prepared to say that by no subsequent conduct of the defendant the irregularity could be waived." Lopes L.J. said (3): "It is said that the proceeding was a nullity, and no doubt the distinction between a nullity and a mere irregularity in procedure is often a very nice one. But in the present case I think there was only an irregularity." Accordingly, the application to set aside the judgment was refused.

Those cases appear to me to establish that a person who is affected by an order which can properly be described as a nullity is entitled *ex debito justitiae* to have it set aside. So far as procedure is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order, and that it is not necessary to appeal from it. I say nothing on the question whether or not an appeal from the order, assuming it to be made in proper time, would be competent. The question, therefore, which we have to decide is whether the admitted failure to serve on the defendant the summons on which the order of January 18, 1940, was based was a mere irregularity, or whether it gives the defendant the right to have the order set aside. In my opinion, it is beyond question that failure to serve process where service of process is required goes to the root of our conceptions of the proper procedure in litigation. Apart from proper *ex parte* proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it has never been adopted in this country. It cannot be maintained that an order which has been made in those circumstances is to be

(1) 23 Q. B. D. 395.

(2) *Ibid.* 398.

(3) 23 Q. B. D. 399.

treated as a mere irregularity and not as something which is affected by a fundamental vice. The affidavit of service in the present case was on the face of it insufficient, and no order should have been completed on the strength of it. The provisions as to service of proceedings under the Courts (Emergency Powers) Act, 1939, in force at the time are to be deduced from what was then the only rule affecting the matter, namely, r. 7 of the Courts (Emergency Powers) Rules, 1939, which provided: "In any proceedings under the Act "in the High Court the procedure shall be regulated by Rules "of Court subject to the provisions of these rules." That refers us to Or. LXVII., r. 2, which, in a case where personal service is not requisite, provides that service will be sufficient if the document to be served is left at the address for service of the person to be served, or if it is posted in a pre-paid registered envelope addressed to the person to be served at that address. In the present case, as appears from the affidavit of service, the summons was not sent to the address for service of the defendant, so the rule was not complied with and the alleged service mentioned in the affidavit was no service at all. It was clearly a mistake and there can be no suggestion of bad faith, but there was no warrant or justification in the Rules of Court for obtaining the order of January 18, 1940, in such circumstances. That order is a nullity, and it must be set aside.

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GODDARD L.J. I agree.

Appeal allowed.

The following order was made : *The defendant by his counsel asking for costs, the court orders that he do have his costs both here and below ; but the court imposes as a condition of making that order that no action shall be brought by the defendant based on the fact that the order complained of was improperly obtained. The costs will be set off against the judgment debt.*

Solicitors for plaintiff : *Samuel Tonkin & Co.*

Solicitors for defendant : *G. F. Wallace & Co.*

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Jan. 20, 21.

SOUTH SHIELDS CORPORATION *v.* LIVERPOOL CORPORATION.

Justices—Juvenile court—Approved school order—Residence—Material date—Children and Young Persons Act, 1933 (23 Geo. 5, c. 12), s. 70, sub-s. 2.

The residence of a child or young person for the purpose of s. 70, sub-s. 2, of the Children and Young Persons Act, 1933, is his home at the time when the approved school order is made.

CASE stated by the chief metropolitan magistrate.

On September 15, 1941, Josephine Anderson, a girl under the age of 17 years, was brought before a juvenile court sitting at Toynbee Hall in the city of London, under s. 62, sub-s. 1, of the Children and Young Persons Act, 1933, as "being in "need of care or protection." Josephine Anderson was born at Jarrow on September 28, 1925, and, except for brief periods, she resided in Jarrow with her mother until the latter's death in 1939, and then with her stepfather until he died in July, 1941. Early in August, 1941, she left her employment in Jarrow and went to the house of a half-sister at Bedlington, Northumberland, where she stayed for a few days. She then returned to Jarrow and stayed for several days in the house of a friend. Thereafter, she went to the house of a half-brother at South Shields. After about two weeks she moved into a boarding house in that town, whence, later in August, she travelled to London with a native of India, with whom she lived until she was brought before the juvenile court. Anderson's only known relative of full blood was a sister who resided with her husband in Liverpool. The girl had expressed her willingness to live with this sister, and the juvenile court, in making a supervision order, directed that the girl should be placed under the care of a Liverpool probation officer. No provision was, however, inserted in the order, pursuant to s. 4 of the Children and Young Persons Act, 1938, determining the place at which the girl was to reside. On October 10, 1941, unknown to the probation officer, the girl left the house of her sister in Liverpool and went to South Shields where she spent the night at the house of a friend. On the following day she was taken into custody at the instance of the Metropolitan police and brought to London. On October 20 she was again brought before the juvenile court

under s. 66, sub-s. 1, of the Act of 1933, and the juvenile court ordered her to be sent to an approved school. Pursuant to s. 70, sub-s. 2, of the Act (1), her place of residence was stated in the order to be the district of the South Shields County Borough Council. This finding imposed on South Shields Corporation the burden of making contributions to the expenses of the approved school, and on April 1, 1942, that authority appealed to the chief metropolitan magistrate at Bow Street police court for an order varying the order of the juvenile court by substituting the city of Liverpool for the county borough of South Shields as the girl's place of residence. The chief magistrate dismissed the appeal. He expressed the opinion that the material date for the purpose of ascertaining residence was the time when the girl was brought before the juvenile court as "being in need of care or protection," and that the proceedings under s. 66, sub-s. 1, did not require proof of any new facts or circumstances, but only that it was desirable in the girl's interests that she should be committed to an approved school. In that sense he regarded the proceedings under s. 66 as a continuance of and referring back to the proceedings under s. 62. South Shields Corporation appealed.

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Harold Williams for South Shields Corporation. The facts establish that Anderson was resident in Liverpool, her place of residence for the present purpose being her place of residence at the date when the approved school order was made. The wish expressed by Anderson when before the juvenile court on September 15, 1941, that she should be permitted to go to her sister in Liverpool, coupled with the order made by the court on that occasion that she should be placed under the supervision of a Liverpool probation officer and the fact that

(1) By Children and Young Persons Act, 1933, s. 70, sub-s. 2: "Every approved school order" [with certain specified exceptions] "shall name the local authority within whose district the child or young person was resident, or if that is not known, the local authority . . . within whose district . . . the circumstances arose . . . rendering him liable to be sent to an approved

"school: Provided that—in determining for the purposes of this sub-section the place of residence of a child or young person, any period during which he resided in any place as an inmate of a school or other institution . . . or in accordance with the conditions of a recognizance, shall be disregarded."

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she lived in Liverpool from the date of the order to October 10, 1941, operate to create a residence in Liverpool which continued, and would continue until a new residence was obtained. The girl cannot, by running away from Liverpool, determine her residence there. Her overnight stay in South Shields on October 10, 1941, at a house at which she had not previously lived, was not sufficient to destroy her residence in Liverpool and to create a residence in South Shields. Proviso (a) to sub-s. 2 of s. 70 has no application to the circumstances of this case. If Anderson's place of residence could not be ascertained with certainty it was the duty of the juvenile court to insert in the order the name of the Liverpool Corporation, as being the authority within whose district the circumstances arose rendering her liable to be sent to an approved school: s. 70, sub-s. 2, of the Act. [He referred to *Stoke-on-Trent Borough Council v. Cheshire County Council* (1); *Yorkshire West Riding County Council v. Colne Corporation* (2); *Leicester Corporation v. Stoke-on-Trent Corporation* (3).

P. McC. O'Connor for Liverpool Corporation. Anderson's residence in Liverpool was residence in accordance with the conditions of a recognizance for the purposes of proviso (a) to sub-s. 2 of s. 70. On a proper construction of the word "resident" in s. 70, sub-s. 2, of the Act, the facts admitted established as a matter of law that Anderson was resident in South Shields. Even if Anderson was not resident in South Shields neither was she resident in Liverpool. In *London County Council v. Birmingham Corporation* (4) a boy of eleven was charged with larceny and placed on probation for twelve months. Within that period he broke the condition of his probation and was ordered by the court to be sent to a certified industrial school. It was held by the Divisional Court that, in deciding the liability of the local authority for his maintenance, the only material question was his place of residence at the time when the offence of larceny was committed and not when the breach of the condition of probation occurred. That case is a strong authority in support of the contention in the present case that the time when the girl's place of residence is to be looked at is when the order was made placing her on probation because the circumstance then arose which rendered her liable to be sent to an approved school. When a young person is brought before a court as being in need

(1) [1915] 3 K. B. 699.

(2) [1917] 82 J. P. 14.

(3) [1918] 83 J. P. 45.

(4) [1924] 1 K. B. 248.

of care and protection, and a supervision order is made, she may be said to acquire a certain status. That status is not altered by the making of a subsequent approved school order under s. 66, sub-s. 1, which dates back to the supervision order. If there is no change of status in the interval the court must look to see where the young person was resident at the time when she was first brought before the court and a supervision order was made. In the circumstances of this case her residence was then London. If what has to be considered is not where she was resident when she was first brought before the court, but where she was resident when the circumstances arose which necessitated her being sent to an approved school, i.e., her running away from Liverpool, then her place of residence was South Shields.

Williams replied.

VISCOUNT CALDECOTE C.J. I have come to the conclusion that the learned magistrate arrived at a wrong decision. Mr. O'Connor has argued that when the girl was first brought before the juvenile court and placed under the supervision of the probation officer, she acquired a certain status, namely, that of a young person needing care and protection, and that from that time forward, whenever she came before the court, she was still a person of that status; that the later proceedings were merely a continuation of the original proceedings; and that, when the question is being considered within the district of what local authority she was resident for the purposes of s. 70, sub-s. 2, it is right to go back to the place in which she was resident when she was first brought before the court as a person needing care and protection.

That view of s. 70, sub-s. 2, is based almost entirely on the words "was resident" in the sub-section, but it puts an emphasis on the word "was" which it will not properly bear. One must always be careful about arguments based on the use of the present tense or the past tense in Acts of Parliament, and to contrast the words "is resident" in s. 35, sub-s. 1 (a), with the words "was resident" in s. 70, sub-s. 2, and to say that the words "was resident" require the court to look back to some previous occasion is over-straining the words of the section. The conclusion at which I have arrived is that the time at which the court should look to see in whose district this girl was resident is the time at which the approved

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school order was under consideration. That means that the court have to ask themselves, not where she slept on the previous night, but where her residence, in the sense of her home, was. That would appear to be the test applied by Darling J. in *Yorkshire West Riding County Council v. Colne Corporation* (1) when he said: "I should have come to the same conclusion [as the justices], that the child resided at home at Skipton, where his father's house was, and that he had run away from home and gone to stay with his aunt in order to avoid arrest for larceny." The residence, therefore, for the purpose of s. 70, sub-s. 2, is the home of the child or young person at the time when the approved school order is made. If that were not the right way in which to answer the question, a child or young person who, after a probation order had been made under s. 62, sub-s. 1 (d), goes, or continues, to reside with his parents, in the family home, which is subsequently moved to another place, and later still has an approved school order made in respect of him, would have to be deemed to be resident, not in the place of his last and real home, however substantial the period during which he has lived there, but where he was living when the probation order was made.

In these circumstances I think that the proper course for us to take is to consider the evidence and to express our opinion with regard to the district in which this girl was resident at the relevant time. That, in my view, was Liverpool, where her only known relative was living and where the girl would have continued to live if she had not run away. The approved school order should, therefore, have the name of Liverpool Corporation substituted for that of South Shields as the local authority within whose district the girl was resident. I have not referred to the four cases which were cited to us. They arose under a different Act, and, although some observations in them may be relevant to this case, I find them of no assistance as authorities laying down any principle of law. This appeal should be allowed.

HUMPHREYS J. I agree.

TUCKER J. I agree.

Appeal allowed.

Solicitors for South Shields Corporation : *Speechly, Mumford & Craig, for Town Clerk, South Shields.*

Solicitors for Liverpool Corporation: *Cree & Son, for Town Clerk, Liverpool.*

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ROBERTS v. LITTLEWOOD'S MAIL ORDER STORES,
LIMITED.

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Jan. 21, 25.

Poison—Sale—Supervision of registered pharmacist — Pharmacy and Poisons Act, 1933 (23 & 24 Geo. 5, c. 25), s. 18, sub-s. 1 (a) (iii.).

By s. 18, sub-s. 1 (a) (iii.), of the Pharmacy and Poisons Act, 1933, the sale of a poison which is included in Part I. of the Poisons List is unlawful unless it "is effected . . . under the supervision " of a registered pharmacist."

A saleswoman at the respondents' retail shop sold to a customer a preparation in a bottle containing a poison included in Part I. of the Poisons List. At the time of the sale the registered pharmacist appointed by the respondents to supervise the sale of poisons was in another room, out of sight or hearing of the transaction and unaware that such a sale was taking place :—

Held, that the sale was not effected under his supervision within the meaning of the Act.

CASE stated by justices.

At a court of summary jurisdiction sitting at Barnsley an information was preferred by the appellant, W. R. Roberts, acting on behalf of the Pharmaceutical Society of Great Britain under the Pharmacy and Poisons Act, 1933, against the respondents, Littlewood's Mail Order Stores, Ltd., charging that they on February 16, 1942, did unlawfully sell by retail at 13-15, Cheapside, Barnsley, a certain poison contained in Part I. of the Poisons List, 1935, namely, strychnine, such poison being contained in a preparation known as compound syrup of hypophosphites B.P.C., such sale not being effected by, or under the supervision of, a registered pharmacist, contrary to s. 18, sub-s. 1 (a) (iii.), of the said Act.

It was proved or admitted that the appellant was a duly appointed inspector of the Pharmaceutical Society fulfilling duties laid on the society by s. 25 of the Act, and that the respondents carried on their business (inter alia) at the said retail shop at Barnsley. The respondents, a corporate body,

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were authorized sellers of poisons in accordance with s. 9 of the Act, and the retail shop was registered for the sale of poisons under s. 12. The registered pharmacist in charge of the drug and medicine department at the shop was Philip Stanley Glover. On February 16, 1942, the appellant in the course of his duties entered the shop, picked out a bottle of the said preparation which was lying on an open counter on which various drugs, medicines and other articles were displayed, and asked the girl assistant the price of it. He was told that it was 1s. 10½d., which he paid, and he kept the bottle. The strychnine therein contained was in the proportion of one grain to twenty liquid ounces. The preparation was a standard medicine. The appellant then asked where Glover was to be found and was informed that he was in the stockroom upstairs. The appellant sent for him and he came five minutes later.

The appellant contended that, in the circumstances, Glover did not supervise the sale. The respondents contended that it was sufficient compliance with the Act that Glover was on the premises at the time of the sale. The justices dismissed the information and the appellant appealed.

Blanco White K.C. and *Bramley* for the appellant. The justices were wrong. It cannot be said that a registered pharmacist is supervising a sale when, not only is he not present when the sale is made, but in fact he knows nothing about it. It is not contended that he must necessarily be present at the sale if he can get his knowledge of it in some other way, but he must know of the sale, so that, if necessary, he can interfere before it is completed. [*Pharmaceutical Society v. Wheeldon* (1) and *Kingsbury v. Director of Public Prosecutions* (2) were referred to.]

Sellers K.C. and *Allister Hamilton* for the respondents. The question was one of fact for the justices, and they have decided it in favour of the respondents. The preparation was a standard medicine displayed on the counter. The registered pharmacist was on the premises and could have been consulted by the shop assistant if a customer had questioned her as to the suitability of the article to be sold. His presence as consultant was the real function which the Act intended to ensure. The Pharmacy Act, 1868, under which *Pharmaceutical Society v. Wheeldon* (1) was decided, required the sale to be made personally by a registered

(1) (1890) 24 Q. B. D. 683, 690. (2) (1926) 43 T. L. R. 79.

pharmacist, and, therefore, a sale by an unregistered assistant was unlawful, but the Act of 1933 allows a sale by an unregistered person "under the supervision" of a registered pharmacist. Where the Act contemplates a greater degree of supervision than was required here it says so, as in s. 19, sub-ss. 4, 5, where it speaks of "direct and personal supervision." In *Pharmaceutical Society of Great Britain v. Watkinson* (1) the defendant, a registered pharmacist who sold a poison from an automatic machine, was held to have been "conducting" his business within the meaning of s. 3 of the Poisons and Pharmacy Act, 1908. Talbot J. said (2): "In any business of any magnitude the person who does conduct it by himself must necessarily . . . leave the actual conduct of the business to others None the less, allowing for all that, the business is personally conducted by himself." In *Kingsbury v. Director of Public Prosecutions* (3), it was held that to constitute "direct personal supervision" within reg. 4 of the Dangerous Drugs Regulations, 1921, it was not necessary that the medical practitioner should be physically present when each dose was taken. [*Hygienic Stores, Ltd. v. Coombes* (4) was also referred to.]

Blanco White K.C. replied.

VISCOUNT CALDECOTE C.J. I preface what I have to say on the point which has been discussed by repeating the words of Hawkins J. in *Pharmaceutical Society v. Wheeldon* (5) where, speaking of the Pharmacy Act, 1868, he said: "Nothing to our understandings can be clearer than that the object of the Act was *beyond all other considerations* to provide for *the safety of the public*, and to guard, as far as possible, all members of the community from the disastrous consequences, so frequent in occurrence, arising from the sale of poisons by persons inadequately acquainted with their baneful properties." I approach the question which has been raised in precisely the same way as I should approach it if it related to the sale of a bottle of neat strychnine or any other poison.

Sect. 18 of the Pharmacy and Poisons Act, 1933, provides: "Subject to the provisions of this Part of this Act, it shall

(1) [1931] 2 K. B. 323.

(2) *Ibid.* 330.

(3) 43 T. L. R. 79.

(4) (1937) 36 L. G. R. 136.

(5) 24 Q. B. D. 683, 688.

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"not be lawful—(a) for a person to sell any poison included "in Part I. of the Poisons List, unless (i.) he is an authorized "seller of poisons ; and (ii.) the sale is effected on premises "duly registered under Part I. of this Act ; and (iii.) the sale "is effected by, or under the supervision of, a registered "pharmacist." This, it will be observed, is not a provision dealing with the conduct of the business. That matter is dealt with by s. 9, which provides that a body corporate shall be an authorized seller of poisons if certain conditions are complied with. One is that the business must be under the management of a superintendent of particular qualifications, and also in each set of premises the business, if not under the personal control of the superintendent, must be carried on under the personal control of a manager or assistant who is a registered pharmacist. There is all the difference in the world, in my judgment, between saying that a business must be carried on under the management of or under the personal control of a pharmacist and saying that a sale must be effected by, or under the supervision of, a registered pharmacist. It has been urged on us that there is no real distinction between the words "personal control" and "supervision." It is quite possible that a man who is upstairs in a room above a shop may be exercising personal control of the business of the shop, but he cannot be said to be supervising a particular sale in the shop. In my view, the words of s. 18, sub-s. 1 (a) (iii.), require that each individual sale shall be effected by, or under the supervision of, a registered pharmacist. It has been suggested that a man can supervise a sale without being bodily present. I do not accept that contention unless some further facts are proved which do not appear in this case. It is conceivable, with the mechanical assistance of a telephone or something of that sort, that a person might be supervising something although he was not on the spot, but in the present case the person who is vouched for as supervising this particular sale was in the stockroom upstairs and only appeared if and when he was asked for. I think there was a complete lack of evidence that this sale was effected under the supervision of a registered pharmacist.

I do not think it necessary to refer to the authorities which have been cited. They turn on their particular facts, and, what is more important, they relate to the interpretation of words which are different from the words in s. 18. No useful guidance to the construction of one set of words can be obtained

by the interpretation of different words in different circumstances. Mr. Sellers, however, said that this is a question of fact which has been determined by the justices on evidence which was sufficient to justify their finding. The conclusion at which the justices arrived was that the sale, though not effected by, was sufficiently effected under the supervision of, Mr. Glover as the duly registered pharmacist. Before it is possible to understand the finding of the justices, it is necessary to look at the contentions of the respondents in the court below, namely, "that, as their registered pharmacist supervised, that is, superintended, the drug and medicine department carried on by them at their said premises, his actual presence at or personal knowledge of every such sale of poisons as was referred to in the said information was not reasonably required on a true construction of the said section." That contention is obviously a submission on a point of law because it relates to the construction of words in an Act of Parliament, and it was on that contention that the justices formed the view that the sale, though not effected by, was sufficiently effected under the supervision of, Mr. Glover. If the justices had not come to what I think was a wrong interpretation of the words of the section, they would not have arrived at their decision. I, therefore, think that this case cannot be treated as an appeal on a question of fact. The justices should have found the offence was proved, and the appeal, therefore, will be allowed.

HUMPHREYS J. I am of the same opinion. I do not think it is necessary or desirable that this court should attempt to state all the circumstances which would, or might, constitute a sale effected by, or under the supervision of, a registered pharmacist, but where a sale is effected by an assistant in a shop in the absence of the registered pharmacist and out of his sight and hearing, when the registered pharmacist has no idea that the sale is going to take place or that it is taking place, and would never have known that it had taken place but for the fact that somebody so informed him, no court is entitled to hold as a matter of fact, because I think it is a matter of law, that that sale has been effected either by the registered pharmacist or under his supervision.

TUCKER J. I agree.

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Solicitors for appellant : *Bell, Brodrick & Gray, for Harold Jackson & Co., Sheffield.*

Solicitors for respondents : *Jaques & Co., for North, Kirk & Co., Liverpool.*

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REX v. DAVIS.

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Jan. 14.

Criminal law—Sentence—Other offences taken into account—Consent by accused person to be given personally and not by his counsel.

Where a prisoner who has been convicted of an offence desires that the court, in passing sentence on him, should take into account other offences committed by him, his consent to the court doing so should be given by him personally and not through his counsel.

APPLICATION for leave to appeal against sentence.

The applicant, Frederick Davis, was tried before the Hertfordshire quarter sessions on a charge of obtaining credit by false pretences. He pleaded guilty and was sentenced to three years' penal servitude. He applied for leave to appeal against his sentence, one of the grounds being that, when sentence was passed on him, a number of other offences were taken into account without his consent. After the applicant had been convicted, a police-constable went into the witness box and was asked whether there were not other cases which the applicant admitted having committed and which he wished to be taken into account in passing sentence on him. The constable replied that that was so, and said that a list of those other charges had been served on the applicant. The chairman asked whether that was sufficient, and the counsel who defended the applicant said that it was sufficient. He added that he had seen the applicant who admitted that he had committed the other offences and wished that they should be taken into account.

No counsel appeared.

The judgment of the court (VISCOUNT CALDECOTE C.J., HUMPHREYS and TUCKER JJ.) was delivered by TUCKER J. The doubt expressed by the chairman was correct, and the assurance given by counsel for the applicant was not well

founded. When an accused person admits the commission of other offences and wishes that they should be taken into account by the court in passing sentence his consent to the court doing so ought to be given by himself personally and not through his counsel. In the present case, however, the applicant had written at the foot of the list of other offences which had been served on him: "I admit all these cases." Further, he heard his counsel say at the trial that he (the applicant) wished that all the cases on the list should be taken into account in passing sentence on him, and to that he made no objection. Therefore, there was no substance in his appeal, and the application must be refused.

Application refused.

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Jan. 27, 28.

Food and drugs—Sale of article to prejudice of purchaser—Proceedings against manufacturers—Purchase of sample for analysis—Division of sample—Retained part sub-divided—Portion only of sub-divided portion produced at hearing—Food and Drugs Act, 1938 (1 & 2 Geo. 6, c. 56), s. 70, sub-s. 1; s. 80, sub-s. 4; s. 83, sub-s. 3.

The appellants were the manufacturers of an egg substitute, a quantity of which was supplied to a grocer. The respondent bought a packet of the article from the grocer whom he informed that it was procured to be submitted to a public analyst. He, thereupon, as required by s. 70, sub-s. 1, of the Food and Drugs Act, 1938, divided the sample into three parts and sealed them up, leaving one part with the grocer, sending the second to the public analyst, and retaining the third himself. At a later date the respondent decided to institute proceedings against the appellants under s. 83, sub-s. 3, of the Act as being the manufacturers and original sellers of the article, for an offence against s. 3, sub-s. 1, of the Act. He, accordingly, opened the sealed portion of the part of the sample retained by him and divided it into two equal parts, resealed them, and sent one part to the appellants, retaining the other part in his possession. At the hearing of the charge against the appellants the respondent produced the divided sealed portion of the sample retained by him and the part of the original sample handed to the grocer. The appellants contended before the justices that the requirement of s. 80, sub-s. 4, of the Act that "the part of the sample retained by the person who procured" it shall be produced at the hearing had not been complied with:—

Held, that, the sample having been taken in accordance with

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the procedure prescribed in s. 70, sub-s. 1, it was "procured in" such circumstances that its division into parts" was required by the Act within the meaning of s. 80, sub-s. 4, and, accordingly, that the requirement of that sub-section that "the part of the sample" retained by the person who procured it shall be produced at the "hearing" was a condition precedent to the conviction of the appellants, notwithstanding that they were the manufacturers and not the actual sellers. The requirement of s. 80, sub-s. 4, was not satisfied by the production at the hearing of a sample which had been altered in quantity or quality by the person by whom it was procured.

CASE stated by justices.

An information was preferred before a court of summary jurisdiction sitting at Staple Hill, Gloucestershire, by the respondent, Percy Wilson Teal, a police sergeant, against the appellants, British Fermentation Products, Ltd., for that they on November 3, 1941, did unlawfully sell to the respondent a certain article of food which was not of the nature, substance and quality of the article, namely, egg substitute, demanded by him, contrary to s. 3, sub-s. 1, of the Food and Drugs Act, 1938.

At the hearing it was proved or admitted that the appellants were the manufacturers of an article sold by them under the description "Chiefegg Egg Substitute Powder." In February, 1941, they consigned a quantity of this article of food to the Danish Bacon Co., Ltd., who sold part of the consignment in packages to one P. H. Kendall, a retail grocer. On November 3, 1941, the respondent purchased at Kendall's shop a tin bearing a label containing the description "Chiefegg Egg Substitute Powder," with which he was supplied in reply to a request for egg substitute. The respondent informed Kendall that the purchase had been made for the purpose of analysis by a public analyst, and then and there in Kendall's presence divided the sample purchased into three parts. He left one of the parts with Kendall, sent a second part to the public analyst, and sealed and retained the third part. On a subsequent date the respondent, having determined to institute proceedings against the appellants by virtue of the provisions of s. 83, sub-s. 3, of the Food and Drugs Act, 1938 (1), opened the

(1) By Food and Drugs Act, 1938, s. 70, sub-s. 1: "A person purchasing a sample of any food or drug with the intention of submitting it to be analysed	" by a public analyst, or taking a sample of food on any premises with the intention of submitting it to be so analysed, shall, after the purchase has
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seals of the retained part of the sample and divided the contents thereof into two equal portions. He re-sealed and retained one of the portions (identified as the "divided sealed portion"), and re-sealed and sent the other portion to the appellants. The sample purchased by the respondent was shown on analysis not to be an egg substitute powder. The divided sealed portion of the sample was produced before the justices at the hearing with the seal intact, and that part of the sample which had been left with Kendall was also produced. Neither portion of the sample had been tampered with, and the certificate of the public analyst showed to the satisfaction of the justices that the composition of the two portions was the same.

It was contended for the appellants that the respondent had failed to comply with the provisions of s. 80, sub-s. 4, of the Food and Drugs Act, 1938, in that the part of the sample retained by the respondent was not produced at the hearing, and that compliance with the provisions of the subsection was a condition precedent to the conviction of the appellants. It was contended for the respondent that the further division of the retained part of the sample was made in order to provide the appellants with a portion of the sample, and that the appellants had not been prejudiced by the failure to produce at the hearing the whole of the retained part

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"been completed or the sample
"has been taken forthwith inform
"the seller or his agent who sold
"the sample . . . of his intention
"to have the sample analysed by
"the public analyst, and shall
"then and there divide it into
"three parts, each part to be
"marked, and sealed or fastened
"up, in such manner as its nature
"will permit, and shall—(a) if
"required so to do, deliver one
"part to the seller or his agent
". . . ; (b) retain one part for future
"comparison; and (c) if he
"thinks fit to have an analysis
"made, submit one part to the
"public analyst . . ."

By s. 80, sub-s. 4: "In any
"proceedings under this Act,
"where a sample has been pro-
"cured in such circumstances
"that its division into parts is

"required by this Act, the part
"of the sample retained by the
"person who procured it shall
"be produced at the hearing."

By s. 83, sub-s. 3: "Where it
"appears to the authority con-
"cerned that an offence has been
"committed in respect of which
"proceedings might be taken
"under this Act against some
"person and the authority are
"reasonably satisfied that the
"offence of which complaint is
"made was due to an act or
"default of some other person
"and that the first mentioned
"person could establish a defence,
"under sub-s. 1 of this section,
"they may cause proceedings to
"be taken against that other
"person without first causing
"proceedings to be taken against
"the first-mentioned person."

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undivided. The justices were of opinion that the appellants had not been prejudiced by the re-division of the sealed portion of the sample, and they convicted them. The appellants appealed.

Thorp K.C. and *Sebag Shaw* for the appellants. The production at the hearing of only half the part of the sample retained by the respondent was not producing "the "part of the sample retained by the person who procured it " within the meaning of s. 80, sub-s. 4, of the Act. The object of s. 70, sub-s. 1, is that there should be a part of the sample retained by the purchaser for future comparison, and, accordingly, it has to be sealed and not interfered with in any way. The statute being a penal one, an accused person is entitled to insist on a strict compliance with its terms, and the production of the whole part of the sample retained by the purchaser, as required by s. 80, sub-s. 4, is a condition precedent to a conviction.

Gattie for the respondent. The justices were right. Where proceedings are taken against a person who is not the actual seller, but who is further back in the chain of responsibility established by s. 83, sub-s. 3, of the Act, that person is not entitled to the benefit of the sampling procedure prescribed by the Act, and it is not necessary in such a case that the provisions of s. 70, sub-s. 1, or the consequential provisions of s. 80, sub-s. 4, should be complied with: see *Cummings v. British Fermentation Products, Ltd.* (1). If, however, compliance with the procedure under s. 80, sub-s. 4, is necessary, the production at the hearing of half the part of the sample retained by the respondent was a sufficient compliance: *Suckling v. Parker* (2).

The judgment of the court (VISCOUNT CALDECOTE C.J. and TUCKER J.) was delivered by

TUCKER J. Mr. Gattie's first contention was that the sampling procedure prescribed by s. 70, sub-s. 1, of the Act does not apply in the case of proceedings under s. 83, sub-s. 3, against a manufacturer who can be made liable for a notional sale under that sub-section, but is only applicable in the case of proceedings against the actual seller. That argument is founded principally on the decision of this court in *Cummings v. British Fermentation Products, Ltd.* (1). In that case

(1) [1942] 2 K. B. 108.

(2) [1906] 1 K. B. 527.

proceedings were taken against the present appellants under s. 83, sub-s. 3, for an offence against s. 6, sub-s. 1, of the Act, and the appellants took the point that no part of the sample procured had been sent to them, although a portion had been sent to the actual seller against whom it had originally been intended that proceedings should be taken. It is clear that for the purposes of that case it was only necessary to decide whether or not the manufacturer was entitled to have delivered to him a part of the sample, and the court held that, the provisions of s. 70, sub-s. 1, having been complied with in respect of the actual seller, the manufacturer was not entitled to have a part of the sample delivered to him. The case, however, did not decide, nor was it necessary to decide, the question whether or not the manufacturer whom it was sought to make liable under s. 83, sub-s. 3, could insist on a strict compliance with the provisions of s. 70, sub-s. 1, and we are of opinion that there is nothing in the decision which decides that question. That being so, it is open to this court to decide, apart from authority, whether Mr. Gattie is right in his contention that the appellants cannot insist on being afforded the benefit of the sampling procedure prescribed by the Act. The language of s. 70, sub-s. 1, is perfectly clear, and it is also clear that in the case before us the respondent did purchase the article for the purpose of analysis and that he did take the steps required by the sub-section. Sect. 80, sub-s. 4, is equally clear and the words in it are very wide. In our view, the sample here was one which had been procured in such circumstances that its division into parts was required by the Act. It had been obtained pursuant to the provisions of s. 70, sub-s. 1, and, that being so, under s. 80, sub-s. 4, its production in court at the hearing was essential and a condition precedent to the conviction of the appellants. We are, therefore, of opinion that, notwithstanding that the proceedings against the appellants were taken under s. 83, sub-s. 3, they were entitled to insist on a strict compliance with the sampling procedure which had in fact been adopted by the respondent, and that there is nothing in *Cummings v. British Fermentation Products, Ltd.* (1) which leads to a contrary view.

That being so, Mr. Gattie's first submission fails. His second submission is that there was a sufficient compliance with s. 80, sub-s. 4, on the facts. He pointed out that there is a finding that the appellants were not prejudiced by the

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course which was adopted, and that the portion of the sample produced at the hearing was capable of analysis, and was in fact analysed. In support of his submission he relied on *Suckling v. Parker* (1). In that case proceedings were taken under s. 9 of the Sale of Food and Drugs Act, 1875, which contained similar provisions with regard to sampling to those in the Food and Drugs Act, 1938. The charge was in connexion with the sale of milk, and when the summons came on for hearing the part of the sample produced in court was found to have been reduced in quantity by half owing to the fact that after the sample had been taken and sealed the cork of the bottle in which the part was contained had become loose with the result that the sample, when produced in court, was useless for the purpose of analysis. Counsel for the appellant took the point that it was a condition precedent to a conviction that the part of the sample retained should not only be produced at the hearing, but that, when produced, it should be in such a condition that analysis of it was possible since the only object of producing it was that it might be analysed. The decision of the court was that it was not a condition precedent to a conviction that the retained part of the sample should be capable of analysis, but the case was sent back to the magistrate with the intimation that, to support a conviction, there must be a finding of fact by him that the sample had been sealed or fastened up in such a manner as its nature would permit, as provided by s. 14 of the Act of 1875. The decision in that case, therefore, was merely that, the inspector having done everything required by the Act, the fact that, for some reason and through no default of his, the sample had, at the time of the hearing, become valueless for the purpose of analysis did not prevent the provisions of the Act from having been complied with. There is nothing in that case to indicate that, if the inspector intentionally and deliberately re-opens the retained part of the sample and so deals with it that either its quantity or its quality is altered, he can produce at the hearing a portion of the retained part or the altered retained part, and successfully maintain that he has fully complied with the provisions of the Act. In the present case there is no suggestion that the respondent did anything wrong. He was doing what he thought was right and proper and fair in giving the appellants a part of the sample, but, in our view, the result of what he did was to

(1) [1906] 1 K. B. 527.

render it impossible for him properly to comply with s. 80, sub-s. 4, when the proceedings came on for hearing. The portion of the sample which he produced on that occasion was not the retained part of the sample. It was something which had become different by his own intentional act. This is a penal statute. The provisions in it with regard to sampling are inserted for the protection of persons against whom proceedings may be taken, and they must be complied with strictly. The conviction must be quashed.

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Appeal allowed.

Solicitors for appellants: *A. Kramer & Co.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for Richard L. Moon, Gloucester.*

P. B. D.

BALLETT v. MINGAY.

C. A.

Infant—Tort—Detinue—Independence of contract of bailment—Loan of articles to infant for weekly sum—Failure to comply with demand for return.

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Nov. 27.

The plaintiff lent an amplifier and a microphone to the defendant, who was 18 years of age, it being agreed that the defendant should pay to the plaintiff a weekly sum for the loan of these articles. Subsequently, the plaintiff demanded their return, but the defendant was unable to comply with the demand, as he had parted with the possession of them to one Chapman. The plaintiff brought an action in the county court for the return of the amplifier and microphone, or, in the alternative, 38*l.* 8*s.*, the value thereof. Among other grounds of defence pleaded was the infancy of the defendant. The county court judge gave judgment in the plaintiff's favour for 38*l.* 8*s.* :—

Held, that the defendant was properly sued in detinue in that, on receiving a demand for the return of the articles, he refused or neglected to return them, and failed to prove that, in parting with the articles, he had not stepped outside the bailment altogether.

Burnard v. Haggis (1863) 14 C. B. (N. S.) 45, explained and followed.

Jennings v. Rundall (1799) 8 T. R. 335, distinguished.

APPEAL from Croydon county court.

The facts are stated in the headnote.

Reported by F. R. R. Burford, Esq., Barrister-at-Law.

C. A. *Gorst* for the defendant. The county court judge was wrong. A breach of contract may not be treated as a tort with the object of making an infant liable to a claim. The tortious act must be altogether independent of the contract : *Jennings v. Rundall* (1) ; Anson's Law of Contract, 1937, 18th ed., p. 133. The effect of the decision of the county court judge is to make the defendant liable on a contract which is not binding on him because of his infancy : *Mercantile Union Guarantee Corporation v. Ball* (2).

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Vester for the plaintiff. The defendant was not entitled to part with the articles. Once it was proved that there had been a demand and a refusal to return them, the onus was on the defendant to show that he was justified in parting with them. He has not discharged that onus, and he is, accordingly, liable in tort : *Reg. v. McDonald* (3) ; *Turner v. Stallibrass* (4) ; *Hiort v. Bott* (5). The tortious act here was quite independent of the contract, and, therefore, this case does not come within the principle of *Jennings v. Rundall* (1). It comes within that of *Burnard v. Haggis* (6). [He also referred to Salmond on the Law of Torts, 1936, 9th ed., p. 67 ; *Coldman v. Hill* (7) ; *Wilkinson v. Verity* (8) ; *Genn v. Winkel* (9).]

Gorst replied.

LORD GREENE M.R. It has been argued that if the judgment of the county court judge stands the defendant will have been held liable for breach of a contract which was not binding on him because he was an infant, and that the attempt to make him liable in tort was a breach of the principle laid down in *Jennings v. Rundall* (1), where an infant, having hired a mare, rode it carelessly, with the result that she was injured. As Byles J. pointed out in *Burnard v. Haggis* (6) the act of the defendant in *Jennings v. Rundall* (1) was not distinct from the contract of hire but was within the four corners of it. In my opinion, the present case does not fall within that principle. From the evidence it seems that, properly construed, the terms of the bailment of these articles to the defendant did not permit him to part with their possession at all. If it was the bargain that he might part with them, it was for him to

(1) (1799) 8 T. R. 335.

(2) [1937] 2 K. B. 498.

(3) (1885) 15 Q. B. D. 323.

(4) [1898] 1 Q. B. 56.

(5) (1874) L. R. 9 Ex. 86.

(6) (1863) 14 C. B. (N. S.) 45.

(7) [1919] 1 K. B. 443.

(8) (1871) L. R. 6 C. P. 206.

(9) (1912) 107 L. T. 434.

establish that fact and he has failed to do so. On that basis the action of the defendant in parting with the goods fell outside the contract altogether, and that fact brings this case within *Burnard v. Haggis* (1). Byles J., in drawing the distinction between that case and *Jennings v. Rundall* (2), said (3) that in *Burnard v. Haggis* (1) the action of the defendant was "an act of tort just as distinct from the contract as if the "defendant had run a knife into [the mare] and killed her." In *Burnard v. Haggis* (1) the undergraduate who had hired the mare, having been told that he must not jump her, lent her to a friend who jumped her, with the result that the mare was killed. Willes J. said (4): "It appears to me that the act of "riding the mare into the place where she received her death-wound was as much a trespass, notwithstanding the hiring for "another purpose, as if without any hiring at all, the defendant "had gone into a field and taken the mare out and hunted "her and killed her. It was a bare trespass, not within the "object and purpose of the hiring." In the present case, therefore, it seems to me, that the defendant was properly sued in detinue in that, on receiving a demand for the return of the articles, he refused or neglected to return them and failed to prove that in parting with them he had not stepped outside the bailment altogether. On that basis, there is a remedy against the defendant in tort, because the circumstances in which the goods passed from his possession and ultimately disappeared were outside the purview of the contract of bailment altogether or, at any rate, were not shown by him to be within it. I am of opinion that the defendant has failed to establish his case, and that the appeal must be dismissed, with costs.

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SCOTT L.J. I agree.

MACKINNON L.J. I agree.

*Appeal dismissed.*Solicitors for plaintiff: *W. F. Hollands, Croydon.*Solicitors for defendant: *R. J. Clark, Croydon.*

(1) 14 C. B. (N. S.) 45.

(3) 14 C. B. (N. S.) 45, 52.

(2) 8 T. R. 335.

(4) Ibid. 53.

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Jan. 19, 20.

REX v. DROXFORD JUSTICES.

Ex parte KNIGHT.

Landlord and tenant—Small tenement—Recovery of possession—Warrant of justices—Stay—Action by tenant for trespass—Application to justices to approve sureties—Duty of justices—Small Tenements Recovery Act, 1838 (1 & 2 Vict. c. 74), s. 3.

By s. 3 of the Small Tenements Recovery Act, 1838, "in every case in which the person to whom such warrant" [of justices for the recovery of possession of a small tenement] "shall be granted" "had not at the time of granting the same lawful right to the possession of the premises, the obtaining of any such warrant as aforesaid shall be deemed a trespass by him against the tenant or occupier of the premises, although no entry shall be made by virtue of the warrant; and in case any such tenant or occupier will become bound with two sureties as herein-after provided to be approved by the said justices . . . to sue the person to whom such warrant was granted with effect and without delay . . . execution of the warrant shall be delayed until judgment shall have been given in such action of trespass . . ."

The owner of premises obtained a warrant for their possession from justices under s. 1 of the Act. The tenant of the premises, alleging that at the time of the granting of the warrant the landlord had not a legal right to possession, began an action in the county court against him for trespass in accordance with the provisions of s. 3. He then applied to the justices to be bound with two sureties to be approved by the justices so that the execution of the warrant might be stayed. The justices refused to deal with the application on the ground that they had already decided the question which was to be tried in the county court:—

Held, that the only question which the justices could consider on such an application was the approbation of the sureties, and a mandamus would be granted to compel them to perform that duty.

APPLICATION for an order of mandamus directed to the justices of the Droxford division of the county of Southampton requiring them to exercise the jurisdiction conferred on them by the Small Tenements Recovery Act, 1838, ss. 3 and 4.

Butler, a farmer, the owner of a cottage which was let to one Knight, wished to obtain possession of the cottage that it might be occupied by one of his farm hands. A notice under the Small Tenements Recovery Act, 1838, s. 1, of an application to the justices to recover possession of the premises

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was, accordingly, served on the tenant. On the hearing of the application it was contended on behalf of the tenant that the requirements of s. 2 of the Act had not been complied with inasmuch as the notice had not been read over, nor its purport and intent explained, to Mrs. Knight, the tenant's wife with whom the notice was left, and that, therefore, the justices ought not to issue their warrant for possession. The justices, however, decided that the requirements of the statute had been complied with, and they issued their warrant directing the constables to give the landlord possession. The tenant, alleging that at the time of the granting of the warrant the landlord had no lawful right to the possession of the premises and that the obtaining of the warrant by the landlord was a trespass against him, began an action in the county court against the landlord for trespass, it being pleaded in the particulars of claim that the notice of application was not read over, nor was the purport or intent thereof explained, to Mrs. Knight. The tenant then applied to the justices under s. 3 of the statute to be bound with two sureties to be approved by the justices to sue the landlord so that the execution of the warrant might be stayed. The justices dismissed the application on the ground that they had already determined the question whether there had been a compliance with the provisions of the statute with regard to the service of the notice. They said nothing about the application to approve the sureties. The tenant then obtained the leave of the court to apply for an order of mandamus to the justices.

Crispin for the tenant. When the application was made to the justices under s. 3 to approve the two sureties the justices had no jurisdiction to refuse the application or to consider any question other than that of the approval of the sureties. As the justices did not consider that question, an order of mandamus ought to be granted to the tenant to compel them to do their duty and approve the sureties. The landlord had no lawful right to possession because of the provisions of the Rent Restrictions Acts. The restrictions on the landlord's right to possession contained in s. 3 of the Rent, etc., Restrictions Amendment Act, 1933, apply to proceedings under the Small Tenements Recovery Act, 1838: *Arnell v. Gover* (1). The procedure provided by s.3 of the Act of 1838 "apparently" "contemplates giving the tenant something in the nature of

(1) Estates Gazette Digest, 1924, 371.

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"a right of appeal if the justices grant the warrant against
 "him": *Sivyer v. Amies*, per Crossman J. (1).

Beecroft for the justices. The suggestion that if an application is made to justices to approve sureties the justices are bound to accept the sureties and stay the proceedings is not correct. Sect. 3 of the Act of 1838 lays down the conditions which shall apply before justices need approve sureties and stay proceedings, and they can refuse to approve sureties when they have themselves heard and determined the question sought to be raised in the action of trespass. Sect. 3 of the Act of 1838 was not intended to cover a case where the justices had all the facts before them and decided that the requirements of the statute had been complied with. Even if there has not been a strict compliance in the present case with the provisions of s. 2 as to the service of the notice, it was a mere irregularity, and the landlord is not to be deemed a trespasser: see s. 6.

Crispin in reply. If the contention on behalf of the justices is accepted there could be no appeal from their decision. It was held by Judge Owen in *Cable v. Myers* (2) that a defect in the service of a notice under the Act of 1838 was more than an irregularity and that in consequence the landlord was a trespasser.

VISCOUNT CALDECOTE C.J. The Small Tenements Recovery Act, 1838, is more than a century old, and it was framed when many persons in humble circumstances could not read. It contains elaborate provisions as to the form of the notice and the proper way of serving it and explaining it to the person on whom it is served. To take advantage of the stay of the execution of the warrant for which s. 3 provides, it was necessary for the tenant to make an application to the justices to approve sureties. The justices then took a course which I am satisfied was wrong. They said that they had already determined the question whether there had been a want of compliance with the provisions of the statute with regard to the service of the notice, but they did not deal with the application to approve the sureties, thereby depriving the tenant of whatever rights s. 3 of the Act gave him with regard to a stay of the execution of the warrant. The application to approve sureties was necessary if the right which s. 3 gave for the execution of the warrant to be stayed was to

(1) [1940] W. N. 246; [1940] (2) (1903) 115 L. T. Journ. 445.
 3 All E. R. 287.

be available to the tenant, and, although the justices might have had their own views of the evidence about the service of the notice, it is plain that s. 3 provides that the justices shall consider the question of sureties to enable the tenant to remain in occupation of the premises while he makes his claim for damages for trespass. Considerable argument has been addressed to the question whether or not the action which has been begun in the county court can succeed, but that matter would require much more discussion than it has received here and I express no opinion on it. I agree with what Crossman J. said in *Sivyer v. Amies* (1), namely, that s. 3 of the Act of 1838 seems to provide something in the nature of an appeal from the decision of the justices, but whether it is to be described as an appeal or not, all we are concerned with here is, first, whether the justices did their duty, and, secondly, whether if they have not, this court should issue an order of mandamus to them to perform it. I have had some doubt as to the second point. I think it possible—I say no more than that—that the proceedings in the county court will result in a decision which will have the same effect as that which the justices have already given on the evidence before them, but, having formed the view that the justices ought to have considered the question of sureties and approved them or not as they thought proper, I think that a mandamus to them to perform that duty should be granted.

HUMPHREYS J. I agree with every word of the judgment which has been delivered by the Lord Chief Justice and I find it unnecessary to add anything.

TUCKER J. I also agree.

Order of mandamus granted.

Solicitors for applicant : *Culross & Co.*

Solicitors for justices : *Cunliffe & Airy, for Gunner & Carpenter, Bishops Waltham, Hants.*

(1) [1940] W. N. 246 ; [1940] 3 All E. R. 287.

1943
Jan. 18, 19,
26.

HERBERT (LORD) v. INLAND REVENUE COMMISSIONERS.

Revenue—Income tax—Settlement—Power to revoke—Settlor entitled to property or income thereof—Income arising under settlement to be treated as income of settlor—More than one settlor—Finance Act, 1938 (1 & 2 Geo. 6, c. 46), s. 38, sub-s. 2.

By s. 38, sub-s. 2, of the Finance Act, 1938: "If and so long as the terms of any settlement are such that—(a) any person has or may have power . . . to revoke . . . the settlement or any provision thereof; and (b) in the event of the exercise of the power, the settlor or the wife or husband of the settlor will or may become beneficially entitled to the . . . property then comprised in the settlement or of the income arising from the whole or any part of the property so comprised; any income arising under the settlement from the property comprised in the settlement in any year of assessment . . . shall be treated as the income of the settlor for that year and not as the income of any other person."

By a settlement, P. and H., as settlors, appointed property to trustees on trust to pay out of the income thereof certain premiums on life policies on the life of P. The settlement contained provisions which brought it within the terms of sub-s. 2. If the settlement had not been made, the income from the property settled would have been that of P. as tenant for life under the will of his father. The income under the settlement was assessed for a year of assessment to income tax on H. by virtue of the provisions of sub-s. 2:—

Held, that no assessment under the sub-section could be made on H.

Where there is more than one settlor the provisions of the sub-section do not authorize an assessment on a settlor who would not be entitled to the income of the property settled if there were no settlement in existence, and *semble* become entirely inapplicable.

CASE stated by the Special Commissioners of Income Tax, who had confirmed assessments to income tax for the years 1938–1939, 1939–1940, and 1940–1941, made on the appellant, Lord Herbert, eldest son of the fifteenth Earl of Pembroke, under s. 38 of the Finance Act, 1938, in respect of income arising under a settlement known as "The accumulation settlement" made by Lord Pembroke and Lord Herbert on April 5, 1930.

By his will the fourteenth Earl of Pembroke, who died on March 30, 1913, settled English estates, Irish estates and capital moneys, known as "the will estate," on his son, the fifteenth earl, as tenant for life with remainder to his grandson, Lord Herbert, as tenant in tail. The fifteenth earl (hereinafter

called "Lord Pembroke") was also tenant in tail male of property in Wiltshire which was granted by the Crown in tail male, and could not, therefore, be disentailed. This property was known as "the Crown estate." In 1925, Lord Herbert being then a minor, the sanction of the court was obtained to a scheme whereby mortgages for substantial sums on Lord Pembroke's life interests in the Crown estate and the will estate, supported by collateral mortgages of policies of insurance on Lord Pembroke's life, were transferred to the trustees of those estates, the mortgages so transferred to each set of trustees being subsequently consolidated. In 1927 Lord Herbert came of age, and in 1930, to ensure provision for Lord Pembroke and members of his family, a second scheme was carried out with the sanction of the court, where necessary. One of the provisions of this scheme was that part of the Irish estates included in the will estate should be vested in trustees upon trust to apply the income arising therefrom in payment of the premiums on the policies on Lord Pembroke's life which were collateral security for the mortgages on his life interests in the Crown and the will estates. The accumulation settlement, made in accordance with that provision of the scheme, and dated April 5, 1930, was made between Lord Pembroke, of the first part, Lord Herbert, of the second part, and the trustees of the settlement, of the third part. The property comprised in the settlement, which consisted mainly of freehold property situated in Eire, was disentailed by a deed dated March 29, 1930. By cl. 1 (ii.) of the accumulation settlement Lord Pembroke and Lord Herbert, as settlors, appointed this property to the trustees on trust to pay out of the income of the property the premiums on the life policies, but this appointment was revocable under the provisions of cl. 1 (i.) of the settlement, and in that event Lord Pembroke and Lord Herbert might become entitled to the property comprised in the settlement.

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Tucker K.C. and *J. A. Wolfe* for Lord Herbert.

Sir David Maxwell Fyfe S.-G., *J. H. Stamp* and *R. P. Hills* for the Crown.

Cur. adv. vult.

1943. Jan. 26. MACNAGHTEN J. read a judgment in which he stated the facts, read s. 38, sub-s. 2, of the Finance Act, 1938, and continued: The accumulation settlement

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admittedly contains provisions which bring it within sub-s. 2 of s. 38, and Lord Herbert is admittedly a settlor. But he is not the only settlor. His father is also a settlor, and Mr. Tucker contends that in the circumstances no assessment can be made on Lord Herbert in respect of the income from the property comprised in the accumulation settlement. Mr. Tucker points out that s. 38, sub-s. 2, provides that the income "shall be treated as the income of the settlor for that year and "not as the income of any other person." Lord Pembroke is admittedly a "settlor," and, it is said, therefore, that the income must be treated as his income and not as the income of any other person. Lord Herbert is "another person," and, therefore, the income cannot be treated as his. If Lord Pembroke were assessed, the same argument, *mutatis mutandis*, could be raised. If there is no flaw in the argument and the words of the sub-section are imperative, as they seem to be, the result is that the provisions of the sub-section become inapplicable where there is more than one settlor.

In view of the fact that the expression "settlement" in this sub-section includes any disposition, trust, covenant, agreement or arrangement, and the expression "settlor" in relation to a settlement means any person by whom the settlement was made, it would seem probable that in many of the settlements that come within this sub-section there must be more than one settlor, but the Act does not prescribe what is to happen when there is more than one settlor, and the question has never come up for decision. It is not suggested that all the settlors can all be assessed in respect of all the income. That, indeed, would seem to be an extravagant proposition. Nor is it suggested by the Crown that the income should be distributed between them. In the course of the argument it was said that where there are two or more settlors the assessment should be made on the settlor to whom the income would have belonged if the settlement had not been made, but that interpretation of the sub-section is of no assistance to the Crown in the present case. The income in question is the income to which Lord Pembroke is entitled as tenant for life under the will of the fourteenth earl. Lord Herbert did not bring it into the settlement. During the lifetime of his father he has no right, title or interest in that income whatsoever.

The interpretation of the sub-section put forward on behalf of the Crown was that where there are two or more settlors the Crown has the option to assess any one of the settlors to

the exclusion of the other, and that, in the case of an assessment to income tax, the option must be exercised by the local inspector of taxes against whose choice there would be no right of appeal by the taxpayer, while, in the case of an assessment to sur-tax, the option would lie with the Special Commissioners. I find myself unable to accept that interpretation. It seems to me fantastic to suppose that Parliament has conferred on inspectors of taxes, or even on the Special Commissioners, the power to choose whether A, or B, or C should be liable to income tax or sur-tax, as the case might be. I, therefore, come to the conclusion that no assessment under the Finance Act, 1938, s. 38, can be made on Lord Herbert during the lifetime of his father in respect of the income arising under the accumulation settlement, and that the decision of the Special Commissioners should be reversed and the appeal allowed with costs.

Appeal allowed.

Solicitors for appellants: *Nicholl, Manisty & Co.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

C. G. M.

BAGGS *v.* LONDON GRAVING DOCK COMPANY,
LIMITED.

C. A.

1943

Jan. 25, 26.

Workmen's compensation—Assessment—Partial incapacity—Conscript soldier—Inability to seek "suitable employment"—Workmen's Compensation Act, 1925 (15 & 16 Geo. 5, c. 84), s. 9, sub-s. 3 (i.).

Evidence—Documentary—Soldier's medical category and capacity for work—Letters from commanding officer—Evidence Act, 1938 (1 & 2 Geo. 6, c. 28), s. 1, sub-ss. 1, 2.

The words "able to earn in some suitable employment or "business after the accident" in s. 9, sub-s. 3 (i.), of the Workmen's Compensation Act, 1925 [which deals with compensation for partial incapacity] have reference only to the workman's physical capacity to work, and where the workman, having been conscripted into the army, is debarred from seeking suitable employment in the labour market, he cannot claim that he is entitled to full compensation on the ground that he is unable to earn anything.

Jones v. Amalgamated Anthracite Collieries, Ltd., ante p. 145, applied.

Statements in letters from a soldier's commanding officer as to the man being in a certain medical category and as to his capacity or incapacity for work, *held* to be admissible in evidence under s. 1, sub-ss. 1, 2, of the Evidence Act, 1938.

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APPEAL from award of judge of Bow county court sitting as an arbitrator under the Workmen's Compensation Acts.

On December 5, 1940, the workman, Baggs, a fitter's mate who was employed by the London Graving Dock Co., Ltd., met with an accident which resulted in the amputation of his index finger. His employers paid him full compensation until August 24, 1941, when, on a medical certificate being produced, compensation was stopped. On November 11 the workman attempted to resume work, but he found that he was unable to perform it, and on November 28 he filed an application for compensation on the basis of full incapacity. On December 17 he was called up under the National Service (Armed Forces) Act, 1939, and was enlisted in the Royal Army Service Corps as a conscript. On January 12, 1942, his application for compensation was heard by the arbitrator, who awarded him full compensation of 35s. a week until December 18, 1941, on which date, he held, the incapacity had come to an end. On October 1, 1942, the workman asked for a review substantially on the ground that he was only receiving the pay and allowances appropriate to his rank as a private in the Royal Army Service Corps, whereas, but for his injury and disablement, he could have joined the Royal Engineers as a tradesman and his pay and allowances would have been appreciably higher. In the course of the arbitration letters from the man's commanding officer as to his medical category and capacity for work were allowed to be put in as evidence in support of the application for a review. On November 5 the arbitrator held that the workman was partially incapacitated, and awarded him half the difference between his average weekly earnings before the accident and his pay and allowances as a soldier. The employers appealed.

Lynskey K.C. and *W. H. Duckworth* for the employers. The arbitrator was wrong in taking into account the pay and allowances of the workman while in the army as being the average weekly amount which he was earning or was able to earn in some suitable employment or business after the accident, within s. 9, sub-s. 3 (1.), of the Workmen's Compensation Act, 1925. Earnings in some suitable employment or business predicate a voluntary employment, whereas the workman in this case was a conscript, and pay and allowances which a man receives while in the army when he has been conscripted are no indication of what he can earn in

suitable employment outside the army : *Jones v. Amalgamated Anthracite Collieries, Ltd.* (1). [*Port of London Authority v. Gray* (2) was also cited.] [They were stopped on this point.]

There was no evidence before the arbitrator regarding what the workman was "able to earn in some suitable employment or business after the accident." On the second point, the arbitrator was wrong in admitting as evidence letters from the workman's commanding officer. Documentary evidence is only admissible if the maker of the statement had personal knowledge of the matters dealt with by it, or where it forms part of a record made in performance of a duty : Evidence Act, 1938, s. 1, sub-s. 1. By sub-s. 2, such statements are admissible if the court is satisfied that "undue delay or "expense" would be caused by the calling as a witness of the maker of the statement. No question of "undue delay or "expense" arises here, and, if the workman wishes to prove his incapacity, he must call a medical officer from his regiment.

Ogilvie Jones (*Gottman* with him) for the workman. It has not been argued for the employers that the arbitrator was wrong in law in holding that the workman had proved a change in the circumstances entitling him to compensation, and it may be assumed that the arbitrator, on ample evidence which was properly before him, has held that the workman has not recovered his capacity for work. He is, therefore, in the situation of an incapacitated workman, injured in the course of his employment, and is entitled to compensation, which has to be computed according to s. 9, sub-s. 3 (1.), of the Act and according to rules laid down in decided cases. It follows from *Jones v. Amalgamated Anthracite Collieries, Ltd.* (1), that a conscripted soldier is withdrawn from the labour market for the purposes of the Workmen's Compensation Acts, that there is no suitable employment open to him, and that he is earning nothing, and is, therefore, entitled to full compensation. There is ample authority for that submission in a series of cases ending with *McCann v. Scottish Co-operative Laundry Association, Ltd.* (3). The words of s. 9, sub-s. 3 (1.), cannot be construed as meaning what the man would be able to earn if he were free to take some suitable employment. [*McNally v. Furness, Withy & Co., Ltd.* (4), and *Harwood v. Wyken Colliery Co.* (5) were also referred to.]

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(1) Ante p. 145.

(2) [1919] 1 K. B. 65.

(3) (1936) 29 B. W. C. C. 1.

(4) [1913] 3 K. B. 605.

(5) [1913] 2 K. B. 158.

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SCOTT L.J. As both my brethren were parties to the decision in *Jones v. Amalgamated Anthracite Collieries, Ltd.* (1), I am going to ask them to give their judgments first.

GODDARD L.J. [stated the facts as set out above, and continued:] When this case came before the arbitrator the judgment of this court in *Jones v. Amalgamated Anthracite Collieries, Ltd.* (1) had not been given. In that case this court decided that the pay and allowances of a conscripted soldier were immaterial in considering what a man's earnings were under s. 9, sub-s. 3 (1.), of the Workmen's Compensation Act, 1925, and could be left out of account. It is, therefore not now open in this court to argue that the pay and allowances of a soldier conscripted under the National Service (Armed Forces) Act, 1939, are to be regarded as earnings. In the case with which we are now dealing the learned arbitrator came to the conclusion that the workman was partially incapacitated, and he assessed his compensation on the basis that his earnings after the accident were his pay and allowances as a private in the Royal Army Service Corps.

The basis on which the arbitrator has to award compensation is one half of the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning, or is able to earn, in some suitable employment or business, after the accident. It has been held by the House of Lords that, if a workman is earning money, the amount which he is earning is the standard to be taken, subject to the exception that if, by his own motion or his own fault, he is earning less than he could earn if he chose, what he could earn would have to be considered. If the workman is not earning wages, the court has to consider what he is "able to earn in some suitable employment or "business after the accident." Mr. Ogilvie Jones has argued that if a workman has not been able to find work, or, because he is in the Army, is debarred from finding work, he is entitled to say that he is able to earn nothing and to be awarded compensation as for total incapacity. That construction has never been placed on this section. "Able to earn" has regard to the workman's physical capacity for earning, and the question to which the arbitrator has to apply his mind is: If there is suitable work for this partially incapacitated man, what can he earn in that work, having regard to his physical capacity?

(1) Ante p. 145.

He is not concerned with whether the man can find work, or whether the conditions are such that he is debarred from seeking it. That is shown by *McNally v. Furness, Withy & Co., Ltd.* (1), where a man who was in prison and so could not find work was held entitled to receive compensation, not on the basis of total incapacity on the ground that he could not earn anything, but on the basis of partial incapacity. In other words, he was physically capable of earning something, which was assessed at 12s. a week, while he was in prison. This court is of opinion that, in view of the decision in *Jones v. Amalgamated Anthracite Collieries, Ltd.* (2), the arbitrator in the present case has not taken into account the proper figures. When this case goes back to him, as it must, he must disregard the workmen's army pay and allowances and estimate what he is physically capable of earning in the labour market.

The other point raised in this appeal is one of evidence. To prove that the workman's incapacity still debarred him from being able to earn full wages, letters from his commanding officer were admitted by the arbitrator in evidence under the provisions of the Evidence Act, 1938. Mr. Lynskey has taken the objection that they should not have been admitted. The Act of 1938 allows documents to be admitted under certain conditions. Sect. 1, sub-s. 1, provides: "In any civil proceedings, where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—(i.) if the maker of the statement either—(a) had personal knowledge of the matters dealt with by the statement; or (b) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and (ii.) if the maker of the statement is called as a witness in the proceedings." Sub-sect. 2 says: "In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be

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“caused, order that such a statement as is mentioned in “sub-s. 1 of this section shall be admissible as evidence or may, “without any such order having been made, admit such a “statement in evidence (a) notwithstanding that the maker “of the statement is available but is not called as a witness ; “(b) notwithstanding that the original document is not “produced, if in lieu thereof there is produced a copy of the “original document or of the material part thereof certified “to be a true copy in such manner as may be specified in the “order or as the court may approve, as the case may be.” In the present case the workman proved that the letters were under the hand of his commanding officer. I think it is open to question whether all the statements in the letters were strictly admissible under the Act, but certain of the statements clearly would be—statements, for instance, that the man was in a certain medical category. The officer commanding a unit must know of his own knowledge in what medical category his men are. With regard to such statements, for instance, as “the man’s capacity for work has definitely been impaired,” the officer commanding can so state because he has the man under his personal observation and can see that his capacity for work is impaired. There were three letters all of which, I think, were admissible on the ground that, if they were not admitted, but the witness had to be called, undue delay or expense would be caused. Not only is the writer of the letters the officer commanding a unit, and whether you could, or when you could, get him as a witness would be quite uncertain, but also he is stationed somewhere in Perthshire. It would be quite unreasonable to expect the workman to be able to bring an officer down from Perthshire with the expense of a return journey. In those circumstances the court thinks that the letters were admissible in evidence.

The case must go back to the arbitrator, not for him to re-hear it as a whole, but to find what the man is “able to earn “in some suitable employment or business after the accident,” and to assess the compensation on that basis.

DU PARCQ L.J. I agree. I wish to say nothing about the question which has been argued under the Evidence Act, 1938, as I have nothing to add to what has just been said by Goddard L.J. on that point.

I have little to add with regard to the other question. It is sometimes forgotten that when s. 9 is under consideration it

must be dealt with as a whole, and regard must be paid to the obvious intention of the legislature. The first words of the section are : "The compensation under this Act where total "or partial incapacity for work results from the injury shall be "a weekly payment during the incapacity of an amount "calculated in accordance with the rules hereinafter con- "tained." It is plain that the legislature intends an injured workman to be compensated for the incapacity, whether it be total or partial, which results from the injury, and not for any incapacity which results from anything else. The arbitrator having decided here that there is partial incapacity, one has to see what are the rules for calculating the amount of compensation for partial incapacity, and one is taken to sub-s. 3. If one does not refine too much on the words, I think that now, at any rate, with the assistance we have from previous decisions of the House of Lords and of this court, the language is quite intelligible. The rules for calculating the weekly payment in the case of partial incapacity are, putting it quite shortly, that the workman is to have a proportion of the difference between his average weekly earnings before the accident and the average weekly amount which he is earning, or is able to earn, in some suitable employment or business after the accident. It is plain that the words "after the accident " in the sub-section do not merely mean "after " but also imply some causal connexion. If what the workman is earning bears no relation to his incapacity, it must be disregarded. *Jones v. Amalgamated Anthracite Collieries, Ltd.* (1), I thought, was one of the instances where what the workman was earning could be disregarded, but the majority of the court decided the case on a rather different ground which went further. They held that what the workman is paid and receives by way of allowances in the Army is not money which he is earning in a "suitable employment or "business." I am aware that there are dicta and perhaps decisions, to the effect that in certain cases this court may not consider itself bound by its own previous decisions, but such cases are most exceptional and I am clear that it would be wrong in the great majority of cases for the court to do anything but follow its previous decisions. Few things are more important than that the law should be certain. I have no doubt, therefore, that we are bound to decide here that there are no earnings in this case.

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Mr. Ogilvie Jones then argues that the man is earning nothing, and is unable to earn anything, in any suitable employment or business because the law does not permit him to go and do such work. That, when considered in the light of the previous decisions, as Goddard L.J. has pointed out, is quite fallacious. The questions are: What was he physically able to earn before the accident? What is he physically able to earn after the accident? To what extent has his earning capacity been reduced by his partial incapacity? If he had had a supervening illness and was totally confined to his bed and unable to earn a penny, one would still have to find how far his earning capacity was reduced by the partial incapacity which he suffered. In the strange case of the man who was confined in one of His Majesty's prisons it was necessary to see what he was capable of earning after the accident, assuming him to have his liberty. If one were to say in such a case that the man could not earn anything because he was locked up and could not seek employment, he would be compensated for total incapacity and not (as the section requires) for partial incapacity. He is suffering from total incapacity in one sense, but in the case of the prisoner the total incapacity is due to his imprisonment and has nothing to do with his accident. A man who is in the Army is also not able to do other work in the sense of being at liberty to go and do it, but he is physically capable of doing some work, and the task which the arbitrator is set is to discover to what extent his ability to do work in suitable employment has been reduced, and what compensation he should have for that. When once we have the assistance of the decision in *Jones v. Amalgamated Anthracite Collieries, Ltd.* (1) one of the more difficult questions in this appeal disappears. I am bound by that authority, and I think that there is no substance in the arguments of Mr. Ogilvie Jones.

SCOTT L.J. I agree with both the judgments which have been delivered, and only in deference to the argument addressed to us on behalf of the workman add that the effect of the decision in this court in *Jones v. Amalgamated Anthracite Collieries, Ltd.* (1) is to make it clear that inability to "earn," within the meaning of that word in the Act, by reason of conscription in His Majesty's Forces for the purpose of a war, is analogous to other causes of such disability or prevention

(1) Ante p. 145.

which have been considered by the House of Lords, such as (1.) illness wholly unconnected with the accident: *Harwood v. Wyken Colliery Co.* (1); (2.) imprisonment: *McNally v. Furness, Withy & Co., Ltd.* (2); (3.) a general state of unemployment which makes it impossible for the workman to earn anything: *Bevan v. Nixon's Navigation Co., Ltd.* (3). The appeal will, therefore, be allowed, and the case will go back to the arbitrator on the grounds indicated in my brethren's judgments.

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Appeal allowed.

Solicitors for employers: *Carpenters.*

Solicitors for workman: *Cliftons.*

(1) [1913] 2 K. B. 158.

(3) (1928) 21 B. W. C. C. 237.

(2) [1913] 3 K. B. 605.

A. W. G.

DAVIES v. RUSTPROOF METAL WINDOW COMPANY,
LIMITED.

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1943
Jan. 14, 15,
29.

Practice—Payment into court—Denial of liability in notice of payment in—Liability admitted in defence—Inconsistency—R. S. C., Or. xxii., r. 1, sub-r. 3.

The plaintiff brought an action against the defendants to recover damages for negligence resulting in his being injured. By their defence, the defendants admitted the negligence alleged and that, as a result of it, the plaintiff had suffered specific injuries, but otherwise they did not admit the particulars of injuries. The defendants also admitted the items of special damage claimed. On the same day as they delivered their defence the defendants paid 750*l.* into court. The notice of the payment was, as prescribed by R. S. C., Or. xxii., r. 1, sub-r. 3, in Form 3 in Appendix B to the rules, and in it the defendants stated that they had paid into court 750*l.* and that that sum was enough to satisfy the plaintiff's claim for damages, but that they denied liability therefor. The plaintiff took out a summons before the master asking that the notice of payment into court should be set aside as being inconsistent with the defence and embarrassing. The master and, on appeal, Cassels J. held that the plaintiff was not embarrassed by the notice because money paid into court under Or. xxii., r. 1, sub-r. 1, could not be taken out except in satisfaction whether paid in with an admission or a denial of liability, and they dismissed the plaintiff's application. The plaintiff appealed:—

Held, that Or. xxii., r. 1, sub-r. 3, did not permit a defendant to admit liability in his defence and deny it in his notice of payment

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into court, and, therefore, that the notice of payment in should be set aside.

Observations on the desirability of amendment of Or. xxii., r. 1, sub-r. 3.

Cumper v. Potheary [1941] 2 K. B. 58, applied.

APPEAL by plaintiff from Cassels J. in chambers.
The material facts are set out in the headnote.

M. Turner-Samuels for the plaintiff.

Humfrey Edmunds for the defendants.

Cur. adv. vult.

1943. Jan. 29. The judgment of the court (SCOTT, MACKINNON and GODDARD L.JJ.) was read by GODDARD L.J., who stated the facts, and continued: Both the master and Cassels J. appear to have taken the view that the plaintiff is not embarrassed by this notice, because money paid into court under Or. xxii. in its present form cannot be taken out except in satisfaction, whether paid in with admission or denial of liability. There is, however, the material difference that, if money is paid in with an admission of liability, it follows that liability is admitted up to the amount paid in and judgment cannot be given for less, which is not the case where it is paid in with denial of liability. Unless, therefore, the rules permit a defendant to pay in with denial in respect of a cause of action which has been admitted on the record, it is, in our opinion, open to the plaintiff to say that, if the defendant desires to avail himself of his right to pay into court, he can only do so in accordance with his defence. He need not make any payment into court, but if he does he must admit liability for what he has paid in.

The question depends entirely on the construction of Or. xxii. In its present form r. 1, sub-r. 1, permits money to be paid into court at any time after appearance in satisfaction of the claim or of one or more of the causes of action, and provides for notice of the payment being given to the plaintiff. Sub-rule 3 provides that the notice shall be in Form 3 in Appendix B and shall state whether liability is admitted or denied. Rule 2 provides for the plaintiff taking the money out of court, which now he can only do in satisfaction, whether liability is admitted or not. Rule 3 provides that, if the whole of the money is not taken out, the money remaining in court shall not be taken out except in satisfaction of the claim or specified cause of

action and in pursuance of an order of the court or a judge. This rule is meant to deal with the case of payments in made in respect of different causes of action. A plaintiff may desire to take out money paid in in satisfaction of one cause of action but not in respect of another, but it is clear under r. 2 that he cannot take out part of a sum paid in in respect of a particular cause of action and continue to pursue his action in respect of it. The present position, unlike that which obtained till 1933 when the rule was altered, is that money, however paid in, must be taken out in satisfaction, or not at all. In our opinion, the order contemplates that the notice should follow the pleading, and it does not permit a defendant to admit liability in his defence and deny it in his notice of payment into court. Indeed, the matter is really concluded by the judgment of this court in *Cumper v. Potheary* (1), where the court dealt with an application to amend a notice of a payment in which had been refused by the judge in chambers. In upholding his decision the court gave as one of its reasons that the notice was objectionable in that it denied the damage which had already been admitted in the defence, but, as we desire to call the attention of the Rule Committee to the matter, we think we may with advantage deal with what the position was before the order was altered in 1933.

Formerly, a defendant could pay money into court with admission of liability either before or with his defence. The plaintiff could take the money out and continue the action in the hope of getting more. A payment in with denial of liability could only be made with, and had to be stated in, the defence. In this case, if the money was taken out, the action was at an end. There was no provision whereby a defendant could say: "I admit I owe you x*l.* which I bring into court, and for the sake of peace I am willing to offer you a further sum which I also bring into court," nor is there in the present rules. This put defendants in some difficulty. They might be unwilling, by admitting liability, to put the plaintiff into the position of being able to continue the action with their money, while, at the same time, they did not wish to incur the expense of putting the plaintiff to the proof of negligence which was, in reality, not in dispute. Those who were in practice before the alteration of the rule in 1933 will remember that where a plaintiff recovered no more

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than was paid into court with a denial, the common form of order as to costs gave the plaintiff, nevertheless, the costs of the issue of liability on which he had succeeded: see *Wagstaff v. Bentley* (1). The first reported attempt to avoid the result is *Critchell v. London & South Western Ry.* (2). There the defendants denied both negligence and damage in their defence and paid a sum into court. At the same time they wrote to the plaintiff saying that the denial of negligence was only formal and that they intended and undertook to admit it at the trial. The Court of Appeal struck out the defence as being an abuse of the process of the court. This case is closely analogous to that which we are now considering. The letter was not a pleading, but it plainly showed that the defence was inconsistent with the defendant's real case. Here the notice under Or. XXII., r. 1, sub-r. 3, which also is not a pleading, is equally inconsistent with the real defence. If the defence in *Critchell v. London & South Western Ry.* (2) was not allowed to stand, neither ought the notice in the present case. Then came *J. R. Munday, Ltd. v. London County Council* (3). There, negligence was not put in issue, but damage, a necessary part of the cause of action, was. The court held that this was legitimate. It showed quite clearly that the issue to be tried was whether the plaintiff had sustained damage and, if so, what the amount should be. This form of pleading has often been adopted, but it may happen, as in the present case, that the defendant is willing to admit both negligence and some injury and damage, but not all that the plaintiff alleges.

We are unable to see why in such circumstances a defendant should not be allowed, if he so desires, to pay into court a sum in satisfaction of the damage that he admits and at the same time make an offer of a further sum which he could pay into court with denial of liability. We do not suggest that this should be limited to actions based on negligence. We see no reason why it should not apply generally. We hope it will be considered whether r. 1, sub-r. 3, may not be altered so as to allow a part of the payment to be made with admission and the excess with a denial of liability. It might also be considered whether a defendant should not be allowed as of right at any time to increase, but only by leave of the court to reduce, the amount paid in, whether with admission or denial of liability.

(1) [1902] 1 K. B. 124.

(3) [1916] 2 K. B. 331.

(2) [1907] 1 K. B. 860.

There may be some good reason why this has not been hitherto allowed, but if there is we are not aware of it. The alterations we have suggested would, at any rate, enable the realities of the situation to be clearly set out in the proceedings. It would, for instance, in personal injury cases enable the defendants to admit the extent of the injuries which were not in dispute. In contract it would do much to make clear the measure of damage for which the defendant would contend where a breach was admitted. In the present state of Or. XXII., this cannot be done, and for the reasons given we are of opinion that the notice in the case before us must be set aside. The appeal is allowed, with costs to the plaintiff here and below in any event.

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Appeal allowed.

Solicitors for plaintiff : *J. H. Milner & Son, for Silverman & Livermore, Liverpool.*

Solicitors for defendants : *Barlow, Lyde & Gilbert.*

P. B. D.

G. H. R. COMPANY, LIMITED *v.* INLAND REVENUE
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Jan. 26 ;
Feb. 1.

Revenue—Stamp duty—Assent by personal representative to devise—“Conveyance on sale”—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 54, sch. I.—Administration of Estates Act, 1925 (15 Geo. 5, c. 23), s. 36, sub-ss. I, II.

An assent given under s. 36, sub-s. I, of the Administration of Estates Act, 1925, by the executors of a vendor to the vesting in the purchaser of property which the vendor, before his death, had agreed to sell to the purchaser but had not conveyed to him is, notwithstanding the provisions of s. 36, sub-s. II, of the Act, chargeable with stamp duty as a “conveyance on sale” within s. 54 of and sch. I. to the Stamp Act, 1891.

Kemp v. Commissioners of Inland Revenue [1905] 1 K. B. 581 distinguished.

CASE stated by the Commissioners of Inland Revenue under s. 13 of the Stamp Act, 1891.

By an agreement dated January 31, 1940, the Hon. Gustavus Lascelles Hamilton-Russell, the tenant for life under a settlement of freehold property, agreed, under s. 38 (i.) of the Settled Land Act, 1925, to sell the settled property to the G. H. R. Co., Ltd., for 385,500*l.*, and the company paid that sum to the

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trustees of the settlement during the life of the tenant for life. On June 2, 1940, the tenant for life died before he had executed a conveyance of the property to the company. On April 3, 1941, his executors, acting under s. 36, sub-s. 1, of the Administration of Estates Act, 1925, assented to the vesting of the property in the company in fee simple. The revenue authorities contended that the assent was a "conveyance or "transfer on sale" within s. 54 of the Stamp Act, 1891 (1), and, therefore, liable to ad valorem duty under sch. I. to that Act. The company contended that the assent was exempt from stamp duty by virtue of s. 36, sub-s. 11, of the Administration of Estates Act, 1925 (2). The commissioners were of opinion that the assent was a "conveyance on sale" within s. 54 of the Stamp Act, 1891, and they assessed the duty at 3855*l*. The company appealed.

King K.C. and *N. C. Armitage* for the company.

Sir Donald Somervell A.-G., *J. H. Stamp*, and *R. P. Hills* for the Crown.

Cur. adv. vult.

1943. Feb. 1. MACNAGHTEN J. The questions submitted for the opinion of the court are (1.) whether the assent is liable to the ad valorem duty assessed by the commissioners; and (2.) if not, with what, if any, duty it is chargeable. The company, having purchased and paid for the freehold properties to which the assent relates, were entitled to the legal estate in those properties otherwise than by devise, bequest, devolution or appropriation. It would seem, therefore, that, as the assent operated to vest the legal estate in the company, it was chargeable with the ad valorem duty as a "conveyance or "transfer on sale," but it was urged by counsel for the company that *Kemp v. Inland Revenue Commissioners* (3) established that such an instrument is exempt from stamp duty. In that case a testatrix by her will devised certain hereditaments to

(1) Stamp Act, 1891, s. 54 :
"For the purposes of this Act the
"expression 'conveyance on sale'
"includes every instrument, and
"every decree or order of any
"court or of any commissioners,
"whereby any property, or any
"estate or interest in any property,
"upon the sale thereof is trans-

ferred to or vested in a purchaser,
"or any other person on his behalf
"or by his direction."

(2) Administration of Estates
Act, 1925, s. 36, sub-s. 11 : "This
"section shall not operate to
"impose any stamp duty in respect
"of an assent"

(3) [1905] 1 K. B. 581.

her nephew. Her executor gave his assent in writing to the devise under s. 3 of the Land Transfer Act, 1897. The commissioners were of opinion that that assent was an instrument whereby the property was transferred to or vested in the devisee within the meaning of s. 62 of the Stamp Act, 1891, which provides: "Every instrument, and every decree or order of any court or of any commissioners, whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person, is to be charged with duty as a conveyance or transfer of property." Accordingly, they assessed the instrument as chargeable with the fixed duty of 10s. The case came before Phillimore J., who decided that the assent was not liable to stamp duty, because an assent by an executor to a devise of real estate under s. 3 of the Land Transfer Act, 1897, was merely evidence that he no longer had any claim on the property and it did not operate to vest it in a devisee. In his opinion, the property became vested in the devisee by the will of the testatrix and not by the assent. In the present case, however, the property to which the assent relates became vested in the company by the assent and not by the vendor's will, and, therefore, the reason given by Phillimore J. for his decision in *Kemp v. Inland Revenue Commissioners* (1) is inapplicable. Phillimore J., however, went on to say (2) that, even if the assent did vest the property in the devisee, he thought that s. 62 of the Stamp Act, 1891, should be read *reddendo singula singulis*, and that the verb "transferred" related to the noun "instrument" and the verb "vested" related to "decree or order of any court or of any commissioners." If, as would seem to be the case, the learned judge considered that an assent which vests real estate in the person entitled to it does not transfer it to him, I am unable to follow this second reason for his decision. The word "transfer" has no technical meaning, and by the assent the real estate in such a case passes from the personal representative to the person named in the assent. In any event, I am not bound by this alternative reason given by the learned judge. In the present case the legal estate in the freehold property had devolved on the vendor's executors and was transferred by them to the company by the assent. It was also suggested that s. 36, sub-s. 11, of the Administration of Estates Act, 1925, applied. The reason for the insertion of that sub-section is not very clear, but it

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(1) [1905] 1 K. B. 581.

(2) *Ibid.* 587.

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may be that, as the section requires that an assent must be in writing whereas formerly it might be by word of mouth or might even be implied by conduct, this sub-section was inserted to indicate that that alteration in the law was not to affect the decision in *Kemp v. Inland Revenue Commissioners* (1) that an assent to a devise is exempt from any stamp duty. In my opinion, the assent in this case is chargeable with the ad valorem duty payable on a conveyance on sale, and the appeal must be dismissed, with costs.

Appeal dismissed.

Solicitors for company: *Gregory, Rowcliffe & Co., for Wilson & Co., Durham.*

Solicitor for Crown: *Solicitor of Inland Revenue.*

(1) [1905] 1 K. B. 581.

W. L. L. B.

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Feb. 3, 4, 5;
Mar. 23.

THORLEY v. PAYNE.

Landlord and tenant—Deduction by tenant from rent of income tax under sch. A—Failure of former tenant occupier to pay tax—Premises sublet by tenant—Arrears of tax collected from sub-tenants—Deduction of tax by sub-tenants from payments of rent to tenant—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), sch. A, No. VIII., rr. 4, 7, 9.

The defendant leased from the plaintiff premises which she sublet in tenements to nine sub-tenants, retaining one tenement which remained unlet and unoccupied during the material period. The husband of the defendant, who had since died, had formerly been the tenant occupier of the premises and had been assessed to income tax in respect of them under sch. A, but he had failed to pay the tax in full and the Inland Revenue, acting under s. 12, sub-s. 3, and sch. I., part III., para. 1, of the Finance Act, 1941, collected part of the arrears from the sub-tenants of the defendant. The sub-tenants, by virtue of para. 3 of part III. of sch. I. to the Act of 1941, deducted from the rents payable by them to the defendant the sums so collected by the revenue, and the defendant sought to deduct these sums from the rent due from her to the plaintiff:—

Held, (1.) that the defendant, having sublet the greater part of the premises which, by r. 8 (c) of sch. A, No. VII., had to be assessed and charged as one entire house or tenement, was not entitled to their beneficial use as occupier, and, therefore, could not deduct, under r. 7 of sch. A, No. VIII., from the rent payable by her to the plaintiff the sum which ought to have been paid in tax; (2.) that the defendant was a "landlord" and not an "occupier" within the meaning of the rules of sch. A, No. VII.

and No. VIII., but that r. 9 of sch. A, No. VIII., did not operate to enable her to pass on to the plaintiff the deductions from rent made by her sub-tenants.

Held, further, that the right to deduct income tax under r. 4 of No. VIII. of sch. A is not limited to tax in respect of the year in which the rent falls due; that the recovery by the revenue authorities of tax direct from the defendant's sub-tenants was equivalent to payment by the defendant herself; and that, therefore, she was entitled to deduct from the rent claimed by the plaintiff the standard rate of tax for the period through which the rent was accruing.

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ACTION tried by Tucker J.

Premises, Nos. 167 and 169 Great Portland Street, London, were let on lease by the plaintiff's predecessor in title to the husband of the defendant. The defendant's husband died intestate on January 22, 1939. Administration of his estate was granted to the defendant on May 1, 1939, and she was beneficially entitled to and accepted the lease of the premises. Subsequently, she surrendered the lease, and the plaintiff granted her a new lease, dated September 16, 1941, but running from March 25, 1940. The defendant's husband had been assessed to tax under sch. A, No. VII., r. 8 (c), in respect of the premises, but he had failed to pay tax amounting to 110*l.* 13*s.* The premises were sublet by the defendant to nine sub-tenants, save that the "fifth floor back" was unlet and remained unoccupied throughout the material period. The sub-tenants had the common use of the staircase and the lift, which, together with the boiler and the central heating apparatus, were maintained by the defendant, who also paid the wages of the lift attendant. By notice dated August 12, 1941, the revenue authorities, under the powers given them by s. 12, sub-s. 3, and sch. I., part III., para. 1, of the Finance Act, 1941, demanded from the sub-tenants, in part satisfaction of the arrears of tax unpaid by the defendant's husband, the payment direct to the revenue of the rents payable by the sub-tenants to the defendant. Pursuant to that notice the sub-tenants paid to the revenue sums amounting to 50*l.* 10*s.* 2*d.* and, under para. 3 of sch. I. to the Act of 1941, they deducted those sums from the rents payable by them to the defendant. By the present action the plaintiff claimed from the defendant 600*l.*, being rent of the premises for the three quarters ending September 29 and December 25, 1941, and March 25, 1942. The defendant contended that her liability to pay the rent had been discharged by a payment of 138*l.* 19*s.* 10*d.* made by

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her direct to the revenue, and by the sum of 508*l.* 10*s.* 2*d.* which had been collected by the revenue from her sub-tenants and deducted by them from her rents.

Mustoe for plaintiff.

Percy Lamb and *Honeyman* for defendant.

Cur. adv. vult.

1943. Feb. 5. TUCKER J. [after stating the facts and reading Income Tax Act, 1918, sch. A, No. VII., rr. 1, 2, 3, 8, and No. VIII., rr. 1, 4, 7, 8, 9; Finance Act, 1927, s. 39; and Finance Act, 1941, s. 12, sub-ss. 2, 3, 4, and parts II. and III. of sch. I. :] Mr. Lamb, on behalf of the defendant, has argued that the defendant is and at all material times was an occupier or tenant occupier within the meaning of sch. A, No. VIII., r. 7, and claims that that rule expressly enables her to take advantage of the sums which have been recovered from the sub-tenants as constituting a discharge of the rent payable by her to the plaintiff. He has drawn attention to the scheme of the legislation whereby the tax is primarily charged on and paid by the occupier, and to the definition of "occupier" in r. 2 of sch. A, No. VII., namely: "Every person having the use of any lands or tenements." In terms r. 7 of No. VIII. deals with a case where the tax ought to have been or ought to be paid by a former tenant or occupier and has not been so paid; and where the tenant occupier for the time being has been called on to pay the arrears. In those circumstances the tenant occupier for the time being "may deduct and retain out of any subsequent payment of rent to his landlord, the sum, or any part thereof, which ought to have been or ought to be so paid." Mr. Lamb contends that the tax which was collected from the sub-tenants should have been paid by the defendant's husband, who was a "former occupier," and that the defendant, as a tenant occupier, has been "required to pay" the amount of that tax because it has been deducted from the rent due to her from her sub-tenants and, therefore, she is entitled to deduct it from the rent payable by her to her landlord. The question is whether the defendant is an "occupier." If she is, it seems clear that she would be entitled to make this deduction.

In support of his argument Mr. Lamb relies on two cases

The first is *Bertram v. Wightman* (1). There the appellant was assessed under schs. A and B to the Income Tax Act, 1918, in respect of some forty acres of land, consisting of lawns, gardens, drives, pathways, woods and shrubberies surrounding a house of which he was the owner. The property was vacated by the appellant on December 2, 1933, and since that date had been unoccupied. The proportion of tax charged in respect of the house and buildings had been discharged under r. 4 of No. VII. of sch. A. The commissioners held that the appellant was properly chargeable as being the person who was the occupier of the property within the meaning of the Income Tax Acts, and that the property was assessable to income tax whether or not the occupier chose to exercise his rights of occupation. Lawrence J., in holding that the commissioners were right, decided that, to be an occupier, it was not necessary that the appellant should actually be using the lands or tenements, but it was sufficient if he was entitled to the beneficial use of them, and that, on the facts of that case, he was entitled to the use, but did not choose to avail himself of it. The present case, however, is very different from that. The only part of the premises in respect of which the defendant was entitled to the beneficial use was the "fifth floor back," which was unoccupied. Taking as a whole the building, which, it is to be observed, under r. 8 of No. VII. is to be assessed and charged as one entire house or tenement, the defendant was not entitled to the beneficial use of it. It is impossible to say that the right to receive rent is equivalent to the right to have the beneficial use of the hereditament itself. The second case cited in aid of the defendant is *Back v. Daniels* (2), which also turned on very special facts. The respondents, wholesale potato merchants, grew potatoes on land which they hired from neighbouring farmers under special agreements, the lands so acquired being changed each season. The respondents had possession of the lands until the potatoes were fully ripe, which in some cases was more and in others less than a year from the date of the agreement. "The land—lord under the agreement had to plough the land," states the headnote, "do all the carting and provide all the horse labour that was necessary. The respondents supplied all the seed, artificial manure, and the manual labour necessary to drill the manure, plant the seed, take up and pit the potatoes and afterwards prepare them for market." The respondents

(1) [1936] 2 K. B. 521.

(2) [1925] 1 K. B. 526.

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claimed to be assessed in respect of the land under sch. B (which for these purposes is the same as sch. A) rather than under sch. D. The landlord was assessed under sch. B in respect of the land, and one of the arguments was that two persons could not be assessed under sch. B in respect of the same land. It was held, however, that "the fact that the 'landlord' had been assessed and charged to income tax 'under sch. B in respect of the occupation of the lands did 'not conclude the matter against the respondents, as having 'regard to the reasoning of the court in *Cox v. Glue* (1), there 'might under sch. B be two persons who were chargeable as 'occupiers in respect of the same lands." Scrutton L.J. pointed out (2): "Now it is clear that at common law, for 'the same land, though hardly for the same portion of it, two 'persons may be in possession at the same time, and each can 'bring trespass." He went on to decide that the respondents in that case were sufficiently in occupation of the land to entitle them to be assessed under sch. B, notwithstanding that the landlord also was in occupation in certain respects of the same property. They had different rights with regard to the land, but rights which entitled each of them to occupation of a different kind. I do not think any real assistance can be obtained by the defendant from that case.

The present case is merely that of a landlord who has let a house to a tenant. It is impossible, under the scheme of sch. A, to say that the defendant and the sub-tenants are both occupiers of this one entire house or tenement. It is conceded that the sub-tenants are occupiers of the portions sublet to them, but it is said that at the same time the defendant was also an occupier. I do not think that she was an occupier. Furthermore, I think it is impossible so to contend for the reason among others that both the defendant and her husband were assessed under r. 8 of No. VII., which expressly provides for the assessment of the landlord instead of the occupier who is the person primarily and ordinarily assessed. For these reasons, therefore, this contention fails.

Mr. Lamb also relied on the fact that the defendant has to maintain the staircase, lift, boiler and heating apparatus, and to provide an attendant to look after the lift, and that the tenants merely have the right to use the staircase and the lift in common, but I do not think that those facts are sufficient to make the defendant an occupier of the entire building or

(1) (1848) 5 C. B. 533.

(2) [1925] 1 K. B. 542.

tenement for the purposes of these rules or at all. I am, accordingly, of opinion that neither she nor her husband were occupiers, but that, within the meaning of the rules, they were landlords as distinct from occupiers.

Mr. Lamb further argued that, even if the defendant was not an occupier, she was entitled to make this deduction by virtue of r. 9 of No. VIII. of sch. A which provides: "Where
"under r. 8 of No. VII. tax has been charged upon a landlord
"in respect of any premises mentioned in para. (c) of that rule,
"and in default of payment by the landlord the tax has been
"levied upon the occupier or occupiers, the tax may be deducted
"and shall be allowed out of the next or any subsequent
"payment on account of rents." The question arises whether the deduction there provided for means a deduction by the occupier from the rent payable by him to his landlord, or whether it entitles anybody who has to pay rent to any landlord to make deductions where further down the scale tax has actually been levied on an occupier? The rule must have the wider meaning if the defendant is to succeed. In my opinion, on the whole, although I do not think that the matter is by any means free from doubt, this rule must have the narrower meaning. It refers to the provisions of the proviso to r. 8 of No. VII. (now amended by s. 12, sub-ss. 3 and 4, of the Finance Act, 1941), which enable unpaid tax to be recovered from the occupier. The whole scheme of this legislation is to enable the occupier, where the tax is recovered from him, to deduct the amount of the tax from any subsequent payment of rent to his landlord, and it would require express words to enable a landlord to make the deduction in such circumstances from any rent payable by him to his superior landlord. Mr. Lamb strongly relied on the fact that in r. 7 of No. VIII. the words are "any subsequent payment of rent to his
"landlord," whereas in r. 9 the words are "the next or any
"subsequent payment on account of rent." Nevertheless, as I have said, I think that when one considers all these rules together, r. 9 was intended to apply only to the tax deducted by the occupier when he is compelled to pay it because the landlord, who has been assessed, has defaulted. When the Finance Act, 1941, was passed and the machinery for recovering arrears from the occupier was extended it would have been simple to give an intermediate landlord a right to deduct when paying his superior landlord, but no such right is given him under part II. of sch. I. to the Finance Act, 1941, and under

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part III. the right is expressly given only to the occupier.

Regard must also be had to the wide language of s. 13, sub-s. 1, of the Finance Act, 1941: "Any tax payable under "sch. A for any year of assessment in respect of any land which "is not otherwise recovered may be recovered from the person "who is for the time being the immediate lessor of the land "as if he had been charged therewith and in the same way "as any other tax charged on him may be recovered." That imposes on the immediate lessor a very heavy liability in certain circumstances, but, apparently, the legislature has not thought fit to provide that where that section is applied he shall have the right to make any deduction as against his superior landlord. When I say "any deduction," I mean any deduction other than that already provided for in r. 4 of No. VIII., because it is conceded that, subject always to the proviso in r. 4 of No. VIII., the defendant is entitled to deduct tax at the rate of ten shillings in the pound from the rent which is owing by her. Her right of deduction is limited to that conferred on her by that rule, but it is not clear whether she has paid this tax. Accordingly, I have decided the question of principle which has been raised, and I leave it to counsel to apply to me later with regard to the precise amount for which judgment should be entered for the plaintiff.

Mar. 23. The case was mentioned to his Lordship, the parties being unable to agree the amount for which judgment should be entered.

TUCKER J. When I delivered judgment on the question of principle I left open the precise amount for which I should give judgment for the plaintiff in order that, if possible, the figure might be agreed between the parties. I did that because, although it had, as I understood, been conceded on behalf of the plaintiff that the defendant was entitled to deduct from the rent claimed in this action, tax, if paid, at the rate of ten shillings in the pound, I was not satisfied whether, on the facts of this particular case, it could be said that the defendant was entitled to rely on r. 4 of sch. A, No. VIII., having regard to the second proviso to that rule (1). My doubt was whether

(1) Sch. A, No. VIII., r. 4: "annual sum . . . a landlord,
 "Where any lands, tenements, "owner or proprietor who has
 "hereditaments, or heritages are "been charged to tax under this
 "subject to the payment of any "schedule or from whom tax is

tax could be said to have been paid by the defendant when there was no evidence that tax for the current year had in fact been paid by her. The parties have not been able to agree the amount for which judgment should be given, and Mr. Mustoe contends that the right to deduct tax is limited to the tax actually paid during the currency of the year in respect of which the rent falls due. Mr. Lamb relies on *Rossdale v. Fryer* (1) and *In re Hayman, Christy & Lilly, Ltd.* (No. 2). *Christy v. The Company* (2), and contends that the general effect of these cases is that where, as in the present matter, the tenant's rent from her sub-tenants has been taken away from her by reason of the fact that the inland revenue have recovered the tax direct from the sub-tenants, that is equivalent to payment by her, and that *In re Hayman* (1) shows that the right to deduct is not limited to the year in which the rent claimed falls due. I think that contention is right, and that the defendant is entitled to deduct tax at the rate of ten shillings in the pound, which is the standard rate for the relevant period. Accordingly, the proper sum for which judgment should be given for the plaintiff is 300*l.* There will be judgment for that amount with costs.

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Judgment for plaintiff.

Solicitors for plaintiff : *Briggs & Johnson.*

Solicitors for defendant : *Burton, Yeates & Hart.*

"deductible under this rule or
"r. 1 or r. 3, shall be entitled on
"making such payment to deduct
"and retain thereout so much of
"the said tax as represents the
"rate or rates of income tax in
"force during the period through
"which the said payment was
"accruing due . . . " "Pro-
"vided . . . that no such person
"as aforesaid who is also a

"tenant or the occupier of the
"lands, tenements, hereditaments,
"or heritages, shall be entitled to
"deduct out of any rent any
"greater sum than the amount of
"tax charged in respect of any
"such property and actually paid
"by him."

(1) [1922] 2 K. B. 303.

(2) [1917] 1 Ch. 545.

A. W. G.

C. A. EASTWOOD *v.* INLAND REVENUE COMMISSIONERS.

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Feb. 17. *Revenue — Sur-tax — Settlement — Income settled on child — Assessability of settlor — Settlement made before April 22, 1936 — Irrevocability — Payment to settlor's wife of income during life of child — Income paid for benefit of child before royal assent to Finance Act imposing charge — Finance Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 34), s. 21, sub-ss. 1, 8, 10.*

By a settlement made before April 22, 1936, the settlor settled funds on trustees on discretionary trusts for the benefit of the settlor's infant daughter. The settlement contained a provision whereby any unapplied income might at the discretion of the trustees be paid to the wife of the settlor. The settlement was, so far as its terms went, irrevocable immediately before April 22, 1936 :—

Held, that for the purposes of s. 21 of the Finance Act, 1936, the settlement must "not be deemed to be irrevocable," by virtue of sub-s. 8 of that section, which must be read as applying to and limiting sub-s. 10 by which irrevocable settlements made before April 22, 1936, were excepted from the operation of the section.

Inland Revenue Commissioners v. Delamere (Lord) [1939] 2 K. B. 667 approved.

Held, also, that, since the unit of time to which a Finance Act applies is the current financial year, s. 21, sub-s. 1, of the Act of 1936 applied to any income paid under the settlement for the fiscal year 1936–1937, whether the payment was made before or after the date on which the Act received the royal assent.

APPEAL from Macnaghten J.

The settlor, Shepherd Eastwood, appealed to the Special Commissioners of Income Tax against two additional assessments to sur-tax made on him for the years ending April 5, 1937 and 1939, and two assessments to sur-tax for the years ending April 5, 1938, and 1940. The appeal raised the question whether certain sums paid under a settlement dated August 6, 1935, to the settlor's daughter, or applied for her education, advancement or benefit, were to be deemed his income for the purposes of sur-tax for the years in question by virtue of s. 21 of the Finance Act, 1936 (1).

(1) By the Finance Act, 1936, s. 21 : Sub-s. 1 : "Where, by
"virtue or in consequence of any
"settlement to which this section
"applies and during the life of the
"settlor, any income is paid to or
"for the benefit of a child of the
"settlor in any year of assessment,
"the income shall, if at the
"commencement of that year the
"child was an infant and un-
"married, be treated for all the
"purposes of the Income Tax Acts
"as the income of the settlor for

By the settlement made on August 6, 1935, the settlor settled 10,000*l.* on trustees to invest the same. It was then provided: "2. The trustees shall from time to time receive "so much of the income from the investment of the said "sum of 10,000*l.* (hereinafter called 'the trust fund') as shall "accrue during the life of the daughter [Margaret Emily Eastwood, who was born on April 1, 1925] and if and while the "daughter shall in their opinion conduct herself with propriety shall according to their judgment from time to time "either pay the whole or any part or parts of the said income "then received to the daughter or apply the whole or any "part or parts thereof for her maintenance, education, "advancement or benefit or in any manner which the trustees "shall think to be for her benefit and they may so pay some "parts and so apply other parts of the said income and shall "not be bound to dispose of the whole of the said income by "either or both such means." "3. Any income which shall not "be applied under the power in that behalf hereinbefore "contained in favour of the daughter may in the uncontrolled "discretion of the trustees be paid to Isabella Frances Eastwood (wife of the settlor) or for or towards the maintenance "education advancement or benefit of any other child or "children of the settlor or if there shall be no such child or "children then the trustees may pay the same or any part "thereof to such charitable institution or institutions as they "shall in their absolute and uncontrolled discretion think fit." During the material years the trustees applied the whole of the income from the settled funds for the maintenance and education of the daughter.

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"that year and not as the income
"of any other person."

Sub-s. 3 makes certain special provisions with regard to irrevocable settlements.

Sub-s. 8: "For the purposes of
"this section a settlement shall
"not be deemed to be irrevocable,
"if the terms thereof provide—
"(a) for the payment to the settlor,
"or, during the life of the settlor
"to the wife or husband of the
"settlor for his or her benefit . . .
"of any income or assets in any
"circumstances whatsoever during
"the life of any child of the settlor

"to or for the benefit of whom any
"income, or assets representing it,
"is or are or may be payable or
"applicable by virtue or in consequence of the settlement."

Sub-s. 10: "This section applies
"to every settlement, wheresoever
"it was made or entered into, and
"whether it was made or entered
"into before or after the passing
"of this Act, except a settlement
"made or entered into before the
"twenty-second day of April,
"1936, which immediately before
"that date was irrevocable."

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It was contended on behalf of the settlor: (1.) that the word "irrevocable" in s. 21, sub-s. 10, of the Finance Act, 1936, was used in its ordinary plain meaning; that the settlement was "a settlement made or entered into before April 22, 1936, which immediately before that date was "irrevocable," and that it was, therefore, outside the operation of the section; (2.) that the settlement was a discretionary trust, the terms of which did not, within the words of sub-s. 8 "provide for" any payments to be made to the settlor or his wife "during the life of any child of the settlor," and that it was, therefore, not covered by sub-s. 8 even if (contrary to contention (1.)) the provisions of sub-s. 8 had any bearing on the construction of sub-s. 10; and (3.) that, in any event, s. 21 of the Finance Act, 1936, could not affect any applications of income made before July 16, 1936, when the Finance Act, 1936, was passed. It was contended for the Crown: (1.) that the settlement was not an irrevocable settlement within the meaning of s. 21 of the Finance Act, 1936, but was a settlement to which that section applied; (2.) that the settlement provided for payment of income to (inter alios) the wife of the settlor during the life of a child of the settlor to or for the benefit of whom any income might be applicable under the settlement; (3.) that, in consequence, s. 21 applied to the settlement and the whole of the sums applied for the benefit of the daughter had been rightly included in the settlor's assessments to sur-tax.

Both before the Special Commissioners and before Macnaghten J. it was admitted on behalf of the settlor that the case was concluded against him at those stages by the decision of Lawrence J. in *Inland Revenue Commissioners v. Delamere (Lord)* (1), and he, accordingly, did not oppose the dismissal of his appeal, subject to his right to argue it in the Court of Appeal.

King K.C. and *F. Grant* for the settlor. [The arguments of counsel are sufficiently indicated in the judgment.]

Sir Donald Somervell A.-G. and *R. P. Hills* for the Crown were not called on to argue, except on the question whether income applied before the date on which the Finance Act, 1936, received the royal assent was within the Act.

LORD GREENE M.R. This appeal is, in substance, against
(1) [1939] 2 K. B. 667.

the decision of Lawrence J. in *Inland Revenue Commissioners v. Delamere* (Lord) (1) which Macnaghten J. followed in the present case without comment.

Two questions only arise for our consideration. The first is whether or not the settlement was, immediately before April 22, 1936, irrevocable within the meaning of s. 21, sub-s. 10, of the Finance Act, 1936. Sub-sect. 10 excepts "a settlement made or entered into before April 22, 1936, which immediately before that date was irrevocable." The settlement in question was not revocable in the ordinary simple sense, but it is contended by the Crown—and that view was accepted by Lawrence J. and by Macnaghten J.—that it was not, on the stated date, an irrevocable settlement for the purposes of the section, because of the provisions of sub-s. 8. It is admitted that the provisions in favour of the wife in this settlement are within the language of sub-s. 8, but it is said that the language of sub-s. 8 is not apt to affect sub-s. 10. It is argued that sub-s. 10 is looking at a past date, namely April 22, 1936, and that if sub-s. 8 was intended to apply to the word "irrevocable" in sub-s. 10 it ought to have contained some such language as: "For the purposes of this section, a settlement shall not be deemed to be or to have been irrevocable" Therefore, it is contended, sub-s. 8 must be confined in its operation to cases falling within s. 21, sub-s. 3—in other words, sub-s. 8 is introduced only to show what is to be and what is not to be an irrevocable settlement for the purposes of sub-s. 3. The short answer to that argument is that, if that was what the legislature intended, sub-s. 8 ought to have said, not "For the purposes of this section," but "For the purposes of sub-s. 3 of this section." As it is, it says in terms: "For the purposes of this section," and sub-s. 10 is part of the section. The question then arises whether the grammatical point to which I have referred compels the court to write in the words "of sub-s. 3" before "of this section." In my opinion, nothing could do more violence to the language. The lack of grammatical neatness is not a matter of such importance as to compel the court to write in such significant words. The words, "For the purposes of this section" are the governing words in sub-s. 8 and it would be quite illegitimate to alter them to get rid of a grammatical error or satisfy a more refined grammatical taste. It would seem that the matter can be better put in

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one of two ways. Either it can be said that sub-s. 8 should be read as meaning: "For the purposes of this section a "settlement shall not be deemed to be irrevocable *as at the "relevant date,"* or sub-s. 10 can be read as though it were "except a settlement made or entered into before April 22, "1936, which immediately before that date was *within the "meaning of this section* irrevocable." To insert such words to satisfy a grammatical purist appears to be much more legitimate than to limit the operation of sub-s. 8 to the case of sub-s. 3. I have put in my own words what Lawrence J. in effect said with greater neatness in his judgment. I do so because this is the first time that the point has come before this court and we have had a careful argument on it.

The second question arises in this way. Sect. 21, sub-s. 1, deals with income "paid for the benefit of a child of the settlor "in any year of assessment." In the present case the income under the settlement for the first relevant year was all applied for the benefit of the child before the date of the royal assent, namely, July 16, 1936, and it is argued that sub-s. 1 can only apply in the case of income received after that date.

It is not disputed that the words "in any year of assessment" in sub-s. 1 include the year of assessment, namely 1936-1937, that was current when the royal assent was given, but it is said that that cannot cover a payment of income before the Act became law. The argument depends entirely on the use of the present tense—"any income *is* paid," and, in my opinion, it fails. It invariably happens that the Finance Act for a particular year does not pass into law until the then current financial year has to some extent elapsed, but the time unit with which the Act deals for the purposes of assessment is the financial year, and it deals normally with the taxable income in respect of the then current financial year. That does not mean that it is retrospective. It is merely the unit of time in respect of which taxation is imposed. Bearing that in mind, there is nothing shocking in the present tense being used in the sub-section. It seems to me that in a context such as this—"where any income is paid in any year of assessment"—one is directed to put oneself at the beginning of the year of assessment (which *ex hypothesi* is past when the Act becomes law) and to see what are the receipts in that year of assessment. If that be the scheme of the section—and, in my view, it clearly is—the use of the present tense is a natural thing. It would lead to remarkable results if the contrary view were

taken, because the whole liability to taxation under this sub-section would depend on the circumstance, which might be fortuitous or might be deliberate, that the income applied under the settlement for the benefit of the child happened to be so applied the day before the royal assent or the day after. I prefer a construction which gives the sensible, businesslike meaning to the sub-section that, the unit of time being the year of assessment, it is with the receipts during that unit of time that the sub-section is dealing. In my opinion the appeal fails on both points and must be dismissed with costs.

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SCOTT L.J. I agree.

MACKINNON L.J. I agree.

Appeal dismissed.

Solicitors for the settlor : *Ridsdale & Son, for Cornish, Forfar & Allen, Liverpool.*

Solicitor for the Crown : *Solicitor of Inland Revenue.*

J. W. H.

WINSTANLEY v. BAMPTON.

1943

Feb. 17, 18,
23.

Defamation—Libel—Privileged occasion—Letter from creditor to commanding officer of debtor.

A commanding officer in His Majesty's forces has an interest in seeing that officers, especially junior officers, serving under him do not incur debts which they are unable or unwilling to discharge, and he, therefore, has a common, or a corresponding, interest with the creditor of one of those officers in the payment of the debt due to the creditor. So, a letter written by the creditor to the commanding officer to secure payment of the debt is written on a privileged occasion. A fortiori, if the motive of the creditor, himself an officer in the services, in writing the letter was to uphold the honour and reputation of His Majesty's forces.

ACTION tried by Viscount Caldecote C.J. without a jury.

The plaintiff, Capt. Richard Clement Innes Winstanley, an officer in the Army, claimed damages for libel from the defendant, Capt. Chichele Keppel Bampton, R.N., in respect of a letter which the defendant had sent to the plaintiff's commanding officer, and which, the plaintiff complained, meant that he was a person who deliberately dishonoured his

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legal obligations, and that he had been guilty of conduct unbecoming an officer and a gentleman. The letter was as follows: "Capt. Winstanley, who I understand is serving under your command, has rented the Estate House, East Cokers, from me since December 16 last. During the whole of his tenancy he has been in arrears with his rent, and at the time of writing is owing 50*l.* 8*s.* Under the circumstances I have considered it necessary to terminate his tenancy at the first opportunity, namely, June 16, and should he persist in refusing payment there seems to be no alternative to the very unpleasant one of taking the matter to court. I have been reluctant to bring the conduct of this officer to your notice." The amount in fact owing by the plaintiff for rent at the date when the letter was written was 16*l.* 16*s.*, and it had only remained unpaid for five days, partly owing to a misapprehension by the plaintiff as to the date on which it fell due. It was admitted by the defendant that the letter was written under a mistake as to the amount due, in consequence of information from his agent being delayed, but he pleaded that the letter was privileged, having been published on a privileged occasion without malice. On his behalf evidence was given by senior officers of the Navy and Army that the normal practice in the services was that before an officer began proceedings against another officer for money alleged to be owing the proposed plaintiff should write to the commanding officer of the proposed defendant, to enlist his assistance in obtaining payment of the amount due without recourse being had to legal proceedings. The object of this practice was, they said, to sustain the honour and reputation of the ship or regiment.

Valentine Holmes for the defendant. If a man has an interest to protect he is entitled in law to make an honest communication regarding it to a person who has a common or corresponding interest in the subject-matter of the communication. Here there was an interest in both the maker of the communication and the person to whom it was made. The defendant had an interest in the payment of his just debt and also the interest which every member of His Majesty's forces has in sustaining the reputation of the services. The commanding officer of the plaintiff clearly had an interest in the officers and men of his regiment fulfilling their legal obligations, and also the same interest as the defendant in

upholding the honour and reputation of the services. There is no evidence of malice. [*Fairman v. Ives* (1), *Hebditch v. McIlwaine and Others* (2), *Rex v. Rule* (3) were referred to.]

G. O. Slade and Raeburn for the plaintiff. To establish privilege there must be a common or corresponding duty or interest on the part of the writer and of the receiver of the communication. It might well be that a letter written by an officer in His Majesty's forces to the commanding officer of a third officer whom he was proposing to sue might be privileged if it were written in the interest of the honour and reputation of the services, but the paramount consideration in the letter complained of here was merely the enforcement of a civil debt. It could not be said to have been the defendant's duty to publish the letter to the plaintiff's commanding officer. There is evidence here both intrinsic and extrinsic of malice. [*Watt v. Longsdon* (4), *Royal Aquarium v. Parkinson* (5), and *Adam v. Ward* (6) were cited.]

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Cur. adv. vult.

1943. Feb. 23. VISCOUNT CALDECOTE C.J. read a judgment in which he said: I have no doubt that the words were defamatory of the plaintiff, though I think the meaning put on them by him is one that the words will not bear. The sting of the letter is contained in the sentence in which the defendant said: "should he" (the plaintiff) "persist in refusing payment there seems to be no alternative to the very unpleasant one of taking the matter to court." A mere statement that the plaintiff was indebted to the defendant could not be held to be defamatory, apart from some special circumstances, but the words which I have quoted seem to me to impute to the plaintiff a deliberate intention to avoid payment of his rent as long as possible and to suggest that he was not likely to pay unless he was compelled by legal proceedings.

I can deal shortly with the defence of justification. Having stated the meaning which I attribute to the words, I do not find that they are true. The plaintiff had omitted to pay his rent punctually, but that is, in my opinion, a very different

(1) (1822) 5 B. & Ald. 642, 648.

(2) [1894] 2 Q. B. 54.

(3) [1937] 2 K. B. 375.

(4) [1930] 1 K. B. 130, 142, 154.

(5) [1892] 1 Q. B. 431, 443, 444.

(6) [1917] A. C. 309, 317.

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thing from a refusal to pay at all or only under compulsion. The real contest was on the defence of privilege. The defendant told me that he had two motives in writing the letter. One was a desire to uphold the good name of the services and a feeling that the non-payment of rent for a long period ought to be checked, and so he thought it was his duty to communicate with the plaintiff's commanding officer as, in the event of the plaintiff's conduct becoming known, it would bring the services into disrepute. His other motive was that he hoped it would have the effect of securing payment of the overdue rent. The defendant said that these two reasons for his writing the letter were, as he put it, "about fifty-fifty." I am disposed to think that he was more concerned with the collection of the money due to him than with the services' reputation, but, even if this was the only real motive in writing the letter, I should hold that the occasion on which the letter was written was privileged. The evidence of naval and military officers, who have had wide experience, satisfied me that a commanding officer in His Majesty's forces has an interest in seeing that officers, especially junior officers, serving under him do not incur debts which they are unable or unwilling to discharge, and I, therefore, think that the plaintiff's commanding officer had a common, or, as it is sometimes called, a corresponding, interest with that of the defendant in the payment of the plaintiff's debt. I observe that the plaintiff's commanding officer in his reply to the letter did not suggest that there was any irregularity on the part of the defendant in communicating with him: see also *Fairman v. Ives* (1).

His Lordship then referred to the opinions of Lord Finlay L.C., Lord Loreburn, Lord Dunedin and Lord Atkinson in *Adam v. Ward* (2); and to the observations of Lord Ellenborough in *Pitt v. Donovan* (3); and of Scrutton and Greer L.J.J. in *Watt v. Longsdon* (4); discussed the evidence on the issue of malice; and said that he had come to the conclusion that the communication complained of had been taken out of the protection afforded by the privileged occasion by the express malice of the defendant. He assessed the damages at 25*l*.

Judgment for plaintiff.

(1) 5 B. & Ald. 642.

(2) [1917] A. C. 309, 318, 320, 340. 154.

(3) (1813) 1 M. & S. 639, 648.

(4) [1930] 1 K. B. 130, 142,

Solicitors for plaintiff : *Hays, Roughton & Dunn.*

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Solicitors for defendant : *William F. Gillham, for Norton, Peskett & Forward, Lowestoft.*

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LEANSE *v.* EGERTON (LORD).1943
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Nuisance—Continuation—Premises damaged in air-raid—Knowledge of owner in possession—Pedestrian injured three days later by falling glass—Liability of owner.

The plaintiff, while walking on the highway, was injured on a Tuesday by glass falling from a window in an unoccupied house belonging to the defendant, the window having been broken in an air-raid during the previous Friday night. Owing to the fact that the offices of the defendant's agents were shut on the Saturday and the Sunday and to the difficulty of getting labour during the week-end, no steps to remedy the risk to passers-by had been taken until the Monday. The owner had no actual knowledge of the state of the premises :—

Held, that the defendant had presumed knowledge of the existence of the nuisance, that he had failed to take reasonable steps to bring it to an end although he had ample time to do so, and that, therefore, he had " continued " it and was liable to the plaintiff.

Statement of law by Lord Romer in *Sedleigh-Denfield v. O'Callaghan* [1940] A. C. 880, 913, applied.

ACTION tried by Viscount Caldecote C.J.

The plaintiff, Irene Leanse, claimed damages for injuries caused to her while she was walking in Curzon Street, London, on Tuesday, November 19, 1940, by a piece of glass falling from a broken window in a house belonging to the defendant. The window had been broken as the result of an air-raid on the night of Friday-Saturday, November 15-16, 1940. At the relevant times neither the defendant nor any caretaker employed by him lived on the premises, and the defendant had no actual knowledge of the state of the house. On the Saturday and Sunday, no steps were taken by or on behalf of the defendant to obviate the danger from falling glass because the offices of the defendant's agents were shut on those days and there was difficulty in getting labour during the week-end, but on Monday, November 18, the agents instructed builders to attend to the house. Before, however, they could do anything, the accident happened. The plaintiff claimed that the

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condition of the house constituted a nuisance, and that the defendant had allowed it to get into that dangerous condition.

Quass for the plaintiff.

Fox-Andrews for the defendants.

VISCOUNT CALDECOTE C.J. The law is not really in question here, nor is it difficult. As the most convenient and readily acceptable statement of it I refer to a passage in Lord Romer's opinion in *Sedleigh-Denfield v. O'Callaghan* (1): "The respondents did not themselves create this potential nuisance, and cannot therefore be held liable for its creation. But an occupier of land upon which a nuisance has been created by another person is liable if he 'continues' the nuisance. What acts or omissions on his part are sufficient to constitute a continuance of the nuisance is a question that probably does not admit of a comprehensive answer. But I agree with my noble and learned friend on the woolsack, whose opinion I have had the privilege of reading, that the occupier 'continues' a nuisance if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with ample time to do so." In the present case, from the moment the damage was done there was a danger to people passing on their lawful occasions along the road. In other words, the house was a nuisance in the condition in which it was. The defendant did not do anything to create that nuisance, to use Lord Romer's phrase, and he is only, therefore, liable if he continues it. The defendant did not live in the house. He had no furniture in it. He did not even have a housekeeper. There was nobody on the premises to watch or take care if anything happened to the house or to remove anything which made it a nuisance, but that cannot make the case any better from the defendant's point of view. The matter must be treated in precisely the same way as it would be treated if the defendant or somebody on his behalf had lived there. The fact that the defendant did not live in the house and did not actually know of the damage to it, does not prevent him from having what Lord Romer called "presumed knowledge" of the damage. He had presumed knowledge on the morning of November 16, which was a Saturday, and it is said on his behalf that on the following Monday, which was the first day when there was a

(1) [1940] A. C. 880, 913.

reasonable opportunity of doing anything, steps were taken by his agents to set builders in immediate operation. In my view, however, the house should not have been left as it was because it was inconvenient or difficult or troublesome to make arrangements with regard to it at once. If, instead of there being loose glass, there had been an obvious injury to a balcony, which was hanging down, nobody would suppose that the occupier of the premises could escape liability for leaving that dangerous state of affairs unattended to, merely because it was brought about on a Saturday or even a Sunday. Something was called for to be done by the defendant. A damaged house in itself is no nuisance. It is only a nuisance when it is likely to cause injury or annoyance to persons who on their lawful occasions come within reach of danger. It may be that, if there had been somebody in the house, the easiest thing would have been to pull out the broken glass, or it may be that the police should have been informed so that a proper warning could be given or a proper barrier formed to prevent persons walking near the house, but nothing was done for a reason which is intelligible from one point of view, although it does not seem to me to excuse the defendant from liability, namely, the difficulty of getting labour on a Saturday. I have come to the conclusion that the defendant is liable on the ground that he continued the nuisance without taking any action to prevent it resulting in injury to some person and, therefore, there will be judgment for the plaintiff for 275*l.* and costs.

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Solicitors for plaintiff: *Franks, Charlesly & Co.*

Solicitors for defendant: *Ellis, Peirs & Co.*

W. L. L. B.

In re MACKLEY.

1943
Feb. 25.

Insurance (Health)—Subsidiary employment—Employment under local authority—“Employment . . . to act in relief of . . . lavatory “attendants”—Appointment by employer as regular employee—National Health Insurance (Subsidiary Employments) Order, 1932 (St. R. & O., 1932, No. 501), sch. I., part III.

From 1934 to 1940 the applicant was employed by a borough council to work for an eight-hour shift on each of two specified days a week as an attendant at one of their public lavatories when the other two attendants were taking their weekly day off duty. She was classed in the wages sheets of the council as a

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latrine attendant, and not as a relief latrine attendant, and, as a permanent employee, was given a check number. Persons doing casual service were also employed by the council, and these were classed as relief attendants and not given check numbers. Contributions under the National Health Insurance Acts and Widows', Orphans' and Old Age Pensions Acts were paid by the council in respect of the applicant's employment:—

Held, that as the council had classed and treated the applicant as a permanent employee, it was not possible to find that she had been "employed to act in relief of . . . lavatory attendants" within part III. of sch. I. to the National Health Insurance (Subsidiary Employments) Order, 1932, and, that, therefore, she was insurable under the National Health Insurance Act, 1936.

CASE stated by the Minister of Health under s. 161 of the National Health Insurance Act, 1936, and R. S. C., Or. LV.B., r. 2.

On April 11, 1941, the applicant, Mrs. Alice Harriet Mackley, in accordance with the provisions of the National Health Insurance (Decision of Questions) Regulations, 1937, applied in writing to the Minister of Health for the determination by him of the question whether her employment by the Ilford Borough Council was employment within the meaning of the National Health Insurance Act, 1936.

The applicant was at all material times employed by the council at Goodmayes Park lavatory, or elsewhere, as a lavatory attendant under a contract of service. The lavatory was open from 7 A.M. to 11 P.M. each day of the week, these periods being divided, for the purpose of lavatory attendance, into two shifts, the first from 7 A.M. to 3 P.M. and the second from 3 P.M. to 11 P.M. The council appointed two women to work as attendants for six shifts each a week, and the applicant to work regularly the remaining two shifts a week—those from 7 A.M. to 3 P.M. each Tuesday and from 3 P.M. to 11 P.M. each Wednesday—thus giving the other two women one day off duty each week. The applicant worked at the Goodmayes Park lavatory from August, 1934, until December, 1939, save for a period of three and a half months when she was transferred to the Goodmayes Lane lavatory, where she worked two shifts a week in place of attendants who were off duty. In December, 1939, she was appointed to work regularly, in addition to the two shifts a week at Goodmayes Park lavatory, one shift a week at the Goodmayes Lane lavatory. She also worked on other days and at other lavatories, if asked to do so, to replace attendants absent by reason of sickness or

holidays. At all material times the applicant was classed in the wages sheets of the council as a latrine attendant and not as a relief latrine attendant. She was appointed as a permanent employee and as such was from the first given a check number. The council also employed persons classed as relief latrine attendants who rendered only casual service as required and were not given check numbers. Contributions under the National Health Insurance Acts and Widows', Orphans' and Old Age Contributory Pensions Acts were paid by the council in respect of the applicant's employment.

The Minister came to the conclusion (1.) that the employment of the applicant by the council was at all material times as a person "employed to act in relief of . . . lavatory attendants," and (2.) that, except from June 6, 1940, her employment as such ordinarily involved less than twenty-eight hours' service weekly. He, accordingly, decided that her employment between August, 1934, and June 5, 1940, was excepted from the scope of compulsory insurance by virtue of the National Health Insurance (Subsidiary Employments) Order, 1932 (r).

Scott Cairns for the applicant. Prima facie the applicant was "employed" within the meaning of the National Health Insurance Act, 1936. The onus is on the Minister to establish that she was not so employed. The National Health Insurance (Subsidiary Employments) Order, 1932, prescribes the classes of employment which are ordinarily to be taken to be of a subsidiary nature only, but it cannot have been intended to include in the scope of the order an employee who has been appointed to work regularly at fixed hours on certain days of the week, and is so working. The applicant was not employed in relief of lavatory attendants. Except for shorter hours her conditions of employment were the same as those of the other two attendants and she was classed by the council as a lavatory attendant and not as a relief attendant.

(1) By National Health Insurance (Subsidiary Employments) Order, 1932. FIRST SCHEDULE. Classes of employment specified as being of a subsidiary nature only and, therefore, excluded from being employment within the meaning of the [National Health Insurance] Act . . . III. Employment under local authorities, etc.

"Employment, ordinarily involving less than 28 hours' service weekly, by any local or other public authority, as a person employed to act in relief of gymnasium or lavatory attendants, or of attendants at a park, playground, or other public open space."

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Ralph Etherton for the Minister of Health. It is admitted that the onus is on the Minister to show that the applicant's employment falls within part III. of sch. I. to the order of 1932. It is immaterial whether the employment of the applicant was regular or not. Persons can act regularly in relief, or they can act temporarily in relief. If the applicant were working six days a week she might yet on each day be working in relief. The applicant was clearly working in relief of the other two attendants. The fact that she is classed on the council's wages sheets as an attendant and not as a relief attendant is immaterial. It is for the court to decide whether or not she is in fact a person employed in relief of attendants.

SINGLETON J. It is no easy question to determine whether or not the applicant was employed "in relief of lavatory attendants." Mr. Etherton read me a definition of "relief" from a well-known dictionary which stated that the word meant "release from a post or duty by a substitute or substitutes who may act either permanently or temporarily." Mr. Scott Cairns, on the other hand, argued that that definition had no application here, and he submitted that there was nothing in the facts as stated, and no inference to be drawn from them, which would enable me to hold that the applicant was employed in relief of lavatory attendants.

I attach great importance to the classification in which the council put the applicant. "The applicant," it is stated in the case, "was at all material times classed in the wages sheets "of the council as a latrine attendant and not as a relief latrine attendant. She was appointed by the council as a permanent employee and as such was from the first given a check number. "The council employ in addition persons classed as relief latrine attendants who render only casual service as required. "Such employees are not given check numbers." I read that as meaning that within the borough council of Ilford there are two classes of latrine attendants—(a) latrine attendants, and (b) relief latrine attendants. That being so, I do not find it possible to say, on this case as stated, that the applicant was employed as a relief latrine attendant or in relief of latrine attendants. She was employed regularly. Her times of duty were fixed. In one sense, I suppose, it might be said that she acted in relief of the other attendants, but she was not appointed to relieve them. I put to Mr. Etherton the case of one woman working four days a week and another three days

a week in employment of this kind. Could it be said that the one who worked three days a week acted in relief of the one who worked four days a week? If that could be said, could it not equally reasonably be put the other way round? It would depend, I suppose, on the terms of the woman's appointment. One woman might have been appointed as an attendant, and the other as relief lavatory attendant. In this case the applicant was appointed by the council as a permanent employee, and as such was from the first given a check number and regular working hours. She was not appointed in relief. I think she was a latrine attendant, just as were the other two employees, and in the same position as they were, except that she worked less days a week. That being so, I hold that the applicant is entitled to succeed.

Solicitors for applicant: *Emanuel, Round & Nathan.*

Solicitor for the Minister of Health: *Solicitor, Ministry of Health.*

A. W. G.

Applied. MITCHELL v. BARNES. [1949]
2 All E.R. 719.

Observations of SCOTT & MACKINNON,
L.JJ., at pp. 332, 333, considered.
INSALL v. NOTTINGHAM CORPN.
[1948] 2 All E.R. 232.

Discussed. INSALL v.
NOTTINGHAM CORPN.
[1949] 1 K. B. 261

DAVIES v. WARWICK.

C. A.

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Landlord and tenant—Rent restriction—Standard rent—"Last let"—
Increase of Rent and Mortgage Interest (Restrictions) Act, 1920
(10 & 11 Geo. 5, c. 17), s. 12, sub-s. 1 (a)—Rent and Mortgage
Interest Restrictions Act, 1939 (2 & 3 Geo. 6, c. 71), s. 3, sub-s. 1;
sch. I. Jan. 15, 18, 29.

By the operation of s. 12, sub-s. 1 (a), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and s. 3, sub-s. 1, of, and sch. I. to, the Rent and Mortgage Interest Restrictions Act, 1939, the standard rent of a house not let on September 1, 1939, is the rent at which it was last let before that date.

Where the last letting, previous to the letting to the plaintiff, had been to a tenant in 1916 at a rent of 4s. 3d. a week, the rent paid by the plaintiff, to whom it was let on October 18, 1939, being 12s. 6d. a week:—

Held, that the standard rent was 4s. 3d. a week, and that the plaintiff was entitled to repayment of the rent overpaid by him during the two years before action brought.

APPEAL from Andover county court.

The plaintiff, the tenant of 105 New Street, Andover, claimed from the defendant, the landlord, 40l. os. 3d., as being

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Singleton J.

C. A. an overpayment of rent for 97 weeks, namely, the difference
1943 between 12s. 6d. a week, the rent paid, and 4s. 3d. a week,
DAVIES the rent which the tenant alleged to be the standard rent of
v. the house. In 1916 the house was let by one Rolfe, the then
WARWICK. owner, to one Tallent, at a rent of 4s. 3d. a week. In 1931
Tallent gave up possession and Rolfe went into possession, the
house thereby becoming decontrolled by virtue of s. 2, sub-s. 1,
of the Rent and Mortgage Interest Restrictions Act, 1923,
but it again became controlled under s. 3, sub-s. 1, of the Rent
and Mortgage Interest Restrictions Act, 1939. In May, 1939,
the defendant bought the house from Rolfe and went into
occupation himself. On October 18, 1939, the defendant let
it to the plaintiff at a rent of 12s. 6d. a week. The county
court judge gave judgment for the defendant, and the plaintiff
appealed.

Stephen Murray for the plaintiff. The only rent which the plaintiff was liable to pay was the standard rent of the house. As the house was not let on September 1, 1939, the standard rent was the rent at which it was last let before that date, namely, 4s. 3d., at which rent it was let in 1916: Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 1 (a); s. 3, sub-s. 1, of, and sch. I. to, the Act of 1939.

Rees-Davies (*Meston* with him). The court will always endeavour to construe a statute so as to avoid injustice or absurdity. If the plaintiff is right, a tenant might claim to be liable only to pay the rent at which a house was let 500 years ago if he could show that it was last let at that date, and that despite the great change since then in the value of money and the hardship which in consequence would fall on the landlord. The legislature could not have intended that such a position should be possible. The court will also lean against a statute being given retrospective effect: *Maxwell on the Interpretation of Statutes*, 8th ed., p. 189. To ascertain a future standard rent by reference to a rent paid in the past is in effect retrospective, and, therefore, a construction of the Act of 1939 which involved such a method of calculation must be avoided. The date which must be looked at to fix the standard rent of this house is October 18, 1939, when it was "first let" to the plaintiff. [*Wheeler v. Wirral Estates, Ltd.* (1) was referred to.] The plaintiff, a free agent, must be assumed to have known how the statutory rent was to be ascertained, but to have

(1) [1935] 1 K. B. 294.

elected to pay the 12s. 6d. It is not suggested that it was an exorbitant rent. In any case, if a sum is recoverable by the plaintiff, he cannot recover more than the amount of rent overpaid during a period of two years: s. 7, sub-s. 6, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938. [*O'Neill v. Duncan* (1) was referred to.]

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Jan. 29. The following judgments were read.

SCOTT L.J. (read by GODDARD L.J.). The real difficulty for the defendant lies in Mr. Murray's concise and clear argument before us, that the house became a controlled house by reason of s. 3 of the Rent and Mortgage Interest Restrictions Act, 1939. Mr. Murray says, and rightly says, that *prima facie* the language of s. 12, sub-s. 1 (a), of the Act of 1920, as amended by sch. I. to the Act of 1939, construed according to the natural meaning of the English language, is free from ambiguity: i.e., that, as the house "was not let on September 1, 1939," "the rent at which it was last let before that date," namely, 4s. 3d. in 1916, was constituted the standard rent of the house. If the Act of 1939 applied, as from the moment of its commencement, to houses already decontrolled and not then let, that conclusion is irresistible. If so, s. 14 of the Act of 1920 entitled the plaintiff to recover over-payments, although, as voluntary payments made in mistake of law and not of fact, they might have been irrecoverable but for that section. We can see no answer to this argument. The house was, undoubtedly, within pre-1920 Acts when it was let by Rolfe to Tallent. It also undoubtedly came within the Act of 1920, because it was still subject to the tenancy of Tallent on July 2, 1920, when that Act came into force, and was within the pecuniary limits of the Act. Had the Act of 1939 applied only to houses already let at the date of its commencement, like the Acts of 1933 and 1938, the house would not have been brought into control, but the Act of 1939 was not so restricted. On the contrary, by s. 3 it brought within the net of control, broadly speaking, every house which fell within its pecuniary limits on September 1, 1939, and, further, the amendment of s. 12 of the Act of 1920, contained in the first schedule to the Act of 1939, imposed on every house within the Act's

(1) (1921) 55 I. L. T. 84.

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pecuniary limits the status of a house with a standard rent, to be measured by the rent which had been payable on the date when the house had last been let, and even if it had only been once let, and that perhaps a century ago, I can see no ambiguity in the material words of s. 12 of the Act of 1920, and it is not irrelevant to note that those very words had appeared in s. 2, sub-s. 1 (a), of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, and were again treated by Parliament as appropriate in 1939. Mr. Davies urged that to refer back to rents paid at earlier dates as the criterion of a future standard rent is to pass retrospective legislation, and that legislation should not be construed so as to give it retrospective effect, but that canon of construction only applies to equivocal language, and the words now in question are, in my opinion, quite clear.

So far as I know, the reference back to an earlier letting has never been the subject of litigation in the courts up to now, and yet there are possibilities in the cast-iron wording of the provision of considerable hardships. It is easy to imagine such a case, for instance, as a small house owned and occupied for several generations by the same family. The statutory reference back to some almost prehistoric letting might take one to a time when economic conditions and the value of money were totally different from what they are to-day. A purchaser in 1938 of a decontrolled house might have bought for investment, intending to get a market rent, such as the 12s. 6d. for 105 New Street, and anyhow would probably have had to pay a capital value based on some such annual yield. The Act would then step in retrospectively and halve the value of his investment. Or, again, a landlord might, as an act of kindness, have let a cottage to some deserving person for a short period at a nominal rent. The retainer dies, and the landlord wants either to let at a market rent, or to sell. In either choice he is penalized by the retrospective provision in the Act. That Parliament was not intending to penalize landlords is shown by s. 6 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, which in certain circumstances made the average rent of comparable houses in the neighbourhood the test for the standard rent. In the present case there is no evidence that either landlord or tenant had any knowledge that the house had ever before been let. Neither plaintiff nor defendant was called as a witness so that the allegations in the pleadings were never tested. I cannot

doubt that, if the hardships of the kind I indicate had been foreseen by Parliament, discretion might well have been given, and might by an amending Act still be given, to the court to have regard to circumstances which make the rigid application of the past-rent rule work unfairly, and in such case to fix a rent with due regard to the fair value of other houses in the neighbourhood and so temper the rigour of the Act. Our judgment must be that the appeal is allowed, on the basis of 4s. 3d. being the standard rent. The number of weeks, however, for which repayment is recoverable will be limited to two years from the filing of the claim.

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MACKINNON L.J. (read by DU PARCQ L.J.). I agree that the effect of the Act of 1939 is that the plaintiff is entitled to recover back 8s. 3d. of such payments of 12s. 6d. as he made within two years of making his claim. I have no means of knowing whether this result works an injustice to the defendant, but it is manifest that in such a case the hasty and ill-considered language of this statute may work very great injustice. If a house was not let on September 1, 1939, the Act of 1939 fixes the standard rent at the sum at which it was last let before that date. If reliance be placed on a previous letting fifty or five hundred years ago, the judge is given no discretion to take into account the altered value of money. If the landlord proves that the rent the tenant agreed to pay is perfectly fair, and is, in fact, lower than the rent being paid by every other tenant of identical houses, the judge is not allowed to consider that. If the landlord proves that the previous letting years ago was an act of charity at a nominal rent by the then owner to his aged relative, or at a low or nominal rent to a servant, the judge cannot take either of these facts into account. If the landlord proves that under the old letting the tenant agreed to do all the repairs whereas in the agreement with the recalcitrant tenant the landlord had to do the repairs, apparently, that is not a matter the judge is allowed to consider. Indeed, if it were proved that at the old letting relied on the landlord agreed to a very low rent in consideration of a lump sum paid down by the tenant, or in consideration of the tenant putting the house in repair and enlarging it, I find it difficult to see how the judge could take either of those circumstances into account. The standard rent under this section is to be "the rent" at which the house was last "let" before September 1, 1939, with no qualification whatever, and

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with no discretion given to the judge to consider the terms and circumstances of that last letting, or even its date. That is why I am constrained to say that this hasty and ill-considered language may work injustice, and I am reminded of some words of the late Sir Frederick Pollock : "It is certain, in any case, that far more class grievances have been raised by legislation than by the purely judicial development of the common law" : *The Genius of the Common Law* (1912), p. 48.

GODDARD L.J. The action out of which this appeal arises was brought to recover a sum paid in respect of rent which it was said was an over-payment in that the rent charged was higher than the standard rent. The action is one given by s. 14 of the Act of 1920, as amended by the Act of 1939, and is limited to rent paid during the past two years. It was really a very simple case, and the confusion and any difficulty that has arisen were caused, in the first place, by the plaintiff concluding his particulars with a prayer for the court to determine the standard rent, which is a proceeding authorized by s. 11 of the Act of 1923. This was wrong. The action was in no sense a proceeding under that section. It was for the plaintiff to prove the standard rent as part of his cause of action. Of course, had this been in dispute, the court would have had to decide what the standard rent was, but it was not a proceeding under s. 11, though from the extract from the court books before us it looks as though everyone thought that it was. These entirely wrong arguments appear to have effectually diverted the judge's attention from the real question, and, finally, he seems to have based his decision in favour of the defendant by reference to s. 2 of the Act of 1933, which in fact has been repealed : see sch. II. to the Act of 1938.

The simple question was whether there was a standard rent attached to this cottage, and, if so, was it less than 12s. 6d. a week, the rent actually paid. The cottage was first let by Rolfe to Tallent in 1916 at 3s. 9d., which was raised by an increase permitted by the Acts to 4s. 3d. In 1931 Tallent quitted and Rolfe went into possession. He afterwards sold to the defendant, who went into possession in May, 1939. Apart from any question of registration, which has not been argued before us, the cottage was, and had been since 1931, decontrolled, but on September 1, 1939, by the Act of that date, it again became subject to the Acts. In October, 1939, the

defendant let it to the plaintiff, who agreed to pay 12s. 6d. and was, no doubt, glad to get it at that rent. He lived in the cottage and paid his rent without complaint for ninety-seven weeks till September, 1941, when the defendant sold the reversion. The plaintiff now sues to recover the difference between 12s. 6d. and 4s. 3d., but it is agreed that in any event, under s. 7, sub-s. 6, of the Act of 1938, he cannot recover more than the over-payment during two years before action. Now the standard rent, in the case of a house which was not let on September 1, 1939, is, by s. 3 of, and sch. I. to, the Act of 1939, and s. 12 of the Act of 1920, the rent at which it was last let before that date, or, in the case of a house first let after September 1, 1939, the rent at which it was first let. This house was first let to the plaintiff after September 1, but it had been let before that date, and the last date at which it was let was some day in 1916, when it was let to Tallent at 3s. 6d., afterwards lawfully raised to 4s. 3d. The defendant admitted in his answer that no statutory notice of increase had been served which would raise the rent above 4s. 3d. Clearly, then, the standard rent was 4s. 3d. The words of the Act are plain and unambiguous and permit of only one construction.

It is said that to give the plain meaning to the words will work hardship on the defendant. Of course it will, but that does not entitle the court to read into the Act words which are not there, or to give to the words that are clear a meaning other than that which they bear. These Acts were, in their origin, war-time Acts, and the re-control in 1939 of houses which were outside or had escaped from their meshes was essentially a war-time measure. It is a commonplace of war time that legislation which Parliament intends for the protection of the public or a class often works hardship on individuals, but this is no reason for refusing to the plaintiff a right of action which the statute gives him any more than the court can refuse the defaulting gamester a plea of the Gaming Act or a spirit drinker, who has obtained credit from a trusting publican, the benefit of the Sale of Spirits Act, 1750, or the Tippling Act, as it is commonly called. To expect the average owner of house and cottage property to remember the provisions of the Rent Restrictions Acts is to look for the impossible. There have altogether, I think, been twelve, and it is always necessary to consult more than one, as the amendments by subsequent Acts have been endless. Even if he had a copy of the useful publication by the Editors of Law Notes, it is too

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much to expect that he would understand, or be able to solve, problems which have puzzled the judges again and again and often led to marked difference of judicial opinion. So, as the defendant now finds to his cost, house property is a dangerous form of investment, particularly so when it is remembered that in 1915 the Acts only applied, outside London, to property let at a rent not exceeding 26*l.* a year, and now houses up to 75*l.* a year are included, irrespective of when they were built, or bought or let.

I confess I am not much impressed by the argument that on the construction we have placed on the section it might perhaps happen that one would have to go back two or three hundred years to find the standard rent in the case of a house which had not been let since that remote period. The class of house most likely to be affected in such improbable circumstances are farm-houses, and they are, for all practical purposes, outside the Act: see s. 12, sub-s. 2 (iii.), of the Act of 1920, and now also s. 3, sub-s. 3, of the Act of 1939. Sect. 12, sub-s. 7, of the Act of 1920 is also a protection. Moreover, if such a case ever did happen, it would probably be very difficult to prove what the rent was unless, perchance, an old lease had been preserved, and the standard rent would then be ascertained under s. 6 of the Act of 1933 by reference to the rent of comparable property.

One other matter I should like to mention. It was said in the course of the argument that, as the proper question was not raised at the trial, it could not be taken on appeal. In answer to that it was said that the rule that a point of law not taken in the county court cannot be raised on appeal, as laid down in *Smith v. Baker & Sons* (1) does not apply to appeals under these Acts. I think the proposition which is to be found at p. 183 of the Law Notes book on Rent Restriction, 18th ed., is too widely stated. The cases cited show that the effect of s. 3 of the Act of 1933, which restricts the power of the court to grant orders for possession, is not to afford a statutory defence to a party, but to limit the jurisdiction of the court. If the court of trial or the Court of Appeal finds that the case is one in which it is debarred from granting an order for possession, it is the duty of the court to refuse it, even though the statute is not raised by the defendant, because there is no jurisdiction to grant it, but that, in my opinion, is all that the cases quoted establish. In cases in which possession is not

(1) [1891] A. C. 325.

sought there may well be points which must be taken in the court below if it is desired to base an appeal on them. Here the point on which we have decided the case necessarily arose in the court below, because it was apparent on the pleadings. The fact that wrong arguments were adduced in support of the case does not disentitle the plaintiff from availing himself of the right arguments in this court. No one could have argued better than did Mr. Murray for the plaintiff and Mr. Rees-Davies for the defendant.

The result is that the appeal is allowed and judgment entered for the plaintiff.

Appeal allowed.

Solicitors for plaintiff: *Barnett Janner, for Lloyd Overstone, Birkenhead.*

Solicitors for defendant: *Taylor, Jelf & Co., for Trethowan, Vincents & Fultons, Salisbury.*

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Jan. 13, 14,
15, 18, 19;
Feb. 5.

Nuisance—Local authority—Flooding of stream—Statutory power to remove obstructions—Use of stream for drainage—Occupation or possession—Power coupled with an interest—Flooding due to weir erected by a riparian owner—Nelson Local Board Act, 1879 (42 & 43 Vict. c. lxxxix.), s. 21.

A corporation had power under a private Act to remove obstructions (including weirs) to the flow of the water of a stream running through their district. At various times the corporation exercised other statutory powers by placing a sewer in the bed of the stream, constructing storm-water overflow pipes and other drains discharging rain-water into the stream, causing overflow water from a reservoir to pass into the stream, and occasionally cleaning a privately-owned weir in the stream. On November 26, 1939, a flooding of the stream occurred which was found to be caused by another weir in private ownership. In an action against the corporation for damages for nuisance in respect of injury to the plaintiffs' property caused by the flooding:—

Held (reversing the decision of Stable J.), (1.) that the placing of a sewer in the bed of the stream and the cleaning of a weir did not put the corporation in occupation or possession of the stream so as to make them liable for the nuisance; and (2.) that the power of the corporation to remove obstructions, including

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weirs, was not coupled with an interest so as to place them under a duty to remove the obstruction causing the flooding merely because they had exercised a number of other statutory powers in matters affecting the stream.

APPEALS from Stable J.

Walverden stream, which flowed through the town of Nelson, Lancashire, had been enclosed in a culvert, and on November 26, 1939, after very heavy rain, a flood occurred causing damage to the premises of the three plaintiffs. In the neighbourhood of the town there were various obstructions along the stream which, starting from down stream and going upwards; were Robert's Weir, the Netherfield Shed Weir, the Victory V. Weir, Netherfield bridge and Walverden Shed Weir. The owners of the Robert's Weir, the Netherfield Shed Weir and Walverden Shed Weir were not parties to the action. The plaintiffs brought the action against Nelson Corporation claiming that Netherfield bridge was the cause of the flooding, and at a later stage they added by consent of the court a claim that the corporation were liable for their failure to exercise their statutory power to remove obstructions in the stream under s. 21 of the Nelson Local Board Act, 1879 (1), and against Fryer & Co. (Nelson), Ltd., as the owners of the Victory V. Weir. Stable J. held that the flooding was not caused by the bridge, but by Netherfield Shed Weir in conjunction with Robert's Weir, and that, if Netherfield Shed Weir had been removed, the same amount of flooding would have been caused by Victory V. Weir in conjunction with Robert's Weir, but that, with the obstructions caused by Netherfield Shed Weir or Victory V. Weir removed, Robert's Weir itself would cause no flooding. He held that the claim against the corporation in respect of the bridge failed, and that the Nelson Local Board Act, 1879, only conferred on them a power and did not impose a duty to remove obstructions in the stream. The corporation were, however, liable for nuisance on the

(1) By Nelson Local Board Act, 1879, s. 21: "The Local Board may from time to time cleanse and scour the stream, and may dredge and deepen the course and channel thereof, and may remove banks, shoals, or other impediments or obstructions to the free flow of the waters therein, whether produced by ordinary

"or extraordinary and whether by natural or artificial causes, and all dams or weirs placed on the bed of, and all encroachments on, or other injuries or nuisances to the banks or bed of the stream, and they may pave the bottom or bed of the stream with such materials and in such manner as they may think fit"

ground that they had an occupation of the material parts of the stream by reason of their insertion of a 21-inch sewer pipe in the bed of the stream and their removal of obstructing debris at Victory V. Weir, combined with the power to remove obstructions. He also held that the company were liable for 5*l.* nominal damages by reason of debris which had collected at the Victory V. Weir and contributed to a nominal extent to the flooding. The corporation and the company appealed. The Court of Appeal upheld Stable J.'s finding of fact that the weirs had caused the flooding, but held there was no sufficient evidence of debris having collected at Victory V. Weir and so allowed the company's appeal.

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Havers K.C., *Simes* and *B. Ormerod* for the corporation. The Nelson Local Board Act, 1879, s. 21, only confers power on the corporation to remove obstructions to the flow of water. It imposes no duty on them. The finding that the corporation had sufficient occupation of the bed of the stream to make them liable for nuisance has no foundation. The corporation by acts done under statutory powers such as laying a sewer or clearing debris acquired no ownership of the bed of the stream. There is no comparison between the present case and a case of landlord and tenant.

Laski K.C. and *Forrester* for Fryer & Co. (Nelson), Ltd.

Clothier K.C. and *Baucher* for the plaintiffs. The corporation had power to do numerous things with this watercourse, and were in sole control. That gave them such possession as would, on the House of Lords decision in *Sedleigh-Denfield v. O'Callaghan* (1), render them liable for a nuisance. Their control is evidenced in three ways. They were under an obligation to send a certain quantity of water down the stream; they were bound to maintain a constant flow of water; and they had various powers under the Act of 1879. The power here is, therefore, coupled with an interest and this is the distinction between *East Suffolk Rivers Catchment Board v. Kent* (2) and the present case. The corporation's sewer actually ran along the bed of the stream. It is said against the plaintiffs that their only complaint is of non-feasance by the corporation, but a corporation is liable for non-feasance. The doctrine of no liability for non-feasance is strictly confined to highway authorities, and arose in their case from the fact that they were indictable if the highway was out of repair, but it has

(1) [1940] A. C. 880.

(2) [1941] A. C. 74.

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no application to sanitary authorities. Here there is no complaint against the corporation as highway authority. The plaintiffs' complaint is that they maintained an obstruction in the stream. [*Hesketh v. Birmingham Corporation* (1), and *Sedleigh-Denfield v. O'Callaghan* (2), were cited.] In *Heap v. Ind Coope & Allsopp, Ltd.* (3), the landlords as well as the tenant were held liable for nuisance, because they had power to repair. The principle is the same as in *Sedleigh-Denfield v. O'Callaghan* (2). The corporation contend that though they have for years used this watercourse for drainage and overflow from their reservoir, and though they know that that user may result in flooding, they are entitled to say: "We who have the sole power to order the removal of the weirs do not intend to use that power. You, neighbouring landowners, who have no power to do anything, must put up with any resultant nuisance." They cannot be heard to say that. A mere power may become a duty if failure to exercise it results in sanctioning a nuisance. There is no difference in this respect between a statutory power and a power arising ex contractu, and that is how the landlord and tenant cases such as *Wilchick v. Marks & Silverstone* (4) become relevant. In that case Goddard J. carried the principle of liability for nuisance further than ever before; but it was carried further still in *Wringe v. Cohen* (5) and *Heap v. Ind Coope & Allsopp, Ltd.* (3). The thread running through all the cases is that the basis of liability is the right of control.

Havers K.C. in reply. It is admitted on behalf of the plaintiffs that a permissive statutory power imposes no duty, but five matters are relied on as giving the corporation an interest in the bed of the stream which, coupled with the power to remove obstructions, including weirs, imposes a duty on them to remove the obstructions causing flooding. These five matters are (1.) placing a sewer in the bed of the stream; (2.) the construction of storm-water overflow pipes discharging into the stream; (3.) the drainage of surface water into the stream in other ways; (4.) discharging overflow water from the corporation's reservoir into the stream; and (5.) the occasional cleansing of the Victory V. Weir. These matters have all been done by the corporation under statutory powers, the first three under the Public Health Act, 1875, and the

(1) [1924] 1 K. B. 260.

(2) [1940] A. C. 880.

(3) [1940] 2 K. B. 476.

(4) [1934] 2 K. B. 56.

(5) [1940] 1 K. B. 229.

other two under local Acts of 1866 and 1879. How can it be said that the exercise of certain permissive statutory powers by a corporation imposes on it a duty to exercise another permissive statutory power? There is no authority to support such a proposition.

Laski K.C. replied on the second appeal.

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Feb. 5. LORD GREENE M.R. read the following judgment. The plaintiffs' case against the corporation is as follows: Under the Nelson Local Board Act, 1879, ss. 20 to 26, certain powers were conferred on the Nelson Local Board, the predecessors of the corporation, for the improvement of the Walverden stream, including, in particular, power to remove weirs and other obstructions to the free flow of water in the stream. The weirs, the combined operation of which was found by Stable J. to have been responsible for the flood, namely, Robert's Weir, and more particularly the Netherfield Shed Weir, and (as to a particular area of flooding) the Walverden Shed Weir, are admittedly weirs which could be removed under these powers. The same applies to the Victory V. Weir which, if the Netherfield Shed Weir were alone to be removed, would then combine with Robert's Weir to produce the same disastrous results. On the facts as found by Stable J. the danger of flooding could be averted by the removal of both the Netherfield Shed Weir and the Victory V. Weir, and, if these two weirs were removed (and the corporation have power to remove them), all would be well without any necessity to remove Robert's Weir. It was not argued that the existence of the statutory power to remove these weirs taken by itself imposed any duty on the corporation to remove them. If the matter had stood there, it could not have been suggested that this Act of Parliament, which in terms does no more than confer a power, must be construed as having also imposed a duty to exercise that power. Reference was indeed made to the decision of this court in *Heap v. Ind Coope & Allsopp, Ltd.* (1), where a lessor who had reserved power to repair the demised premises was held liable for injury suffered by a passer-by by reason of a defective light shaft cover. The liability was, it is true, based on the existence of a power to repair, but the decision can have no application to the case of powers conferred by statute, which are powers and nothing

(1) [1940] 2 K. B. 476.

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more. To hold otherwise would be to treat a statutory power to repair as being the same thing as a statutory duty to repair and this is for obvious reasons illegitimate. As I understood Mr. Clothier's argument he did not dispute the correctness of this view, but he put his argument in two ways. First, he said that the rule that no action will lie for failure to exercise a statutory power is confined to cases where the power is what he described as a "mere" power, and that in the present case the corporation had what he described as "a power coupled with an interest," that interest being derived from the five matters to which I will refer in a moment, and that the existence of that interest imposed on the corporation an obligation to exercise their powers of removal. Secondly, he said (and this is the argument which was accepted by Stable J.) that, by reason of those five matters, the corporation were in possession or occupation of the bed of the stream (including, as I understand, the weirs), and that, being thus in possession or occupation and having in addition the power of removing the weirs, the corporation come under a duty to exercise the power of removal.

The five matters to which I have referred are as follows : (a) the laying by the corporation of a 21-inch sewer along part of the culverted bed of the stream ; (b) the construction by the corporation of a number of storm overflow pipes which discharge into the stream ; (c) the drainage of surface water into the stream by means of gratings and pipes constructed by the corporation ; (d) the direction of overflow water from the corporation's reservoir into the stream ; (e) the occasional cleansing of the Victory V. Weir by the corporation. I will give a word of explanation with regard to each of these matters, but, before I do so, I must make it clear that, in view of Stable J.'s findings of fact, no one of them had anything to do with the flooding of which complaint is made in the sense that the corporation could be held liable by reason of their actions in these respects. But for the obstructions caused by Robert's Weir, the Netherfield Shed Weir and the Walverden Shed Weir, which Stable J. found to be responsible, there was ample capacity in the culvert carrying the stream to deal with the water turned into it by these works of the corporation, even allowing for the presence of the sewer. Of these five matters, the works referred to in (a), (b) and (c) were merely works constructed by the corporation in exercise of its powers under the Public Health Act, 1875. The operation referred

to in (*d*) is carried out in pursuance of the statutory obligations imposed by s. 8 of the Nelson Local Board Act, 1879, and apparently also those imposed by the Nelson Water and Gas Act, 1866. These obligations to direct water from the corporation's reservoir into the stream were clearly imposed for the protection of persons interested in the water flowing in the stream to prevent the right conferred on the local board to impound the water of the stream for the purposes of its waterworks being exercised in such a way as unduly to deprive such persons of the benefit of the natural flow of the stream. The acts of the corporation mentioned in (*e*) were performed by the corporation in exercise of their statutory power of cleansing under s. 21 of the Act of 1879.

The case as so presented by Mr. Clothier is one for which he was unable to cite any authority. If either of the two ways in which he formulated it were correct in law, startling results would follow and corporations possessing statutory powers would be placed in a position of great difficulty and danger. Speaking generally, I fail to see how a local authority which possesses and exercises a number of statutory powers conferred on it for different purposes can thereby come under an obligation to exercise another statutory power which, again for a different purpose, it happens to possess. Mr. Clothier endeavoured to make his argument more presentable by pointing out that all the five matters on which he relied had reference to the Walverden Stream, and he said that by their exercise the corporation had acquired an "interest" in or obtained "possession or occupation" of the stream including, apparently, the offending weirs, but this argument is, in my opinion, fallacious. The acts of the corporation in the five matters relied on were in each case limited to the particular scope of the statutory power or duty under which they were performed. By turning the storm, surface and reservoir water into the stream and cleansing the Victory V. Weir, the corporation were not acquiring an "interest" in the stream in any relevant sense, nor did they thereby come into "possession or occupation" of any part of the bed of the stream or the culvert, much less of the offending weirs. In the case of the sewer, it may very well be that the corporation can be regarded as being in occupation or possession of so much of the bed of the stream as is necessary to maintain the sewer, but beyond this their occupation or possession cannot possibly go. If each of these operations of the corporation,

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when regarded separately, is insufficient to convert their statutory powers of removing obstructions into duties, the fact that they performed all five cannot place them in a worse position in that respect. It would be a serious deterrent to a local authority to use statutory powers if it were told that it could only do so on pain of coming under an obligation to do something else in respect of which the legislature had deliberately refrained from imposing any duty on it. The fallacy underlying this attempt to combine the corporation's statutory power to remove obstructions with the alleged possession or occupation to impose on the corporation a duty to exercise their statutory power can, I think, be exposed in another way. If the corporation were in fact in possession or occupation of the bed of the stream, including the offending weirs (e.g., if they had acquired those rights by purchase) their liability in respect of flooding caused by the artificial damming of the water would have arisen from the fact of their possession or occupation. They would have been in precisely the same position as any other person in possession or occupation of a watercourse who artificially accumulates the water and then allows it to escape on to his neighbour's land. The obligation to remove the obstructions would not have arisen in any way from the existence of the statutory powers, nor would the obligation have been an obligation to exercise those powers. The obligation to remove the obstructions would have existed if the statutory powers had never been granted.

I have said that no authority was cited in support of these novel propositions. Reference was indeed made to an expression used by Lord Romer in *East Suffolk Rivers Catchment Board v. Kent* (1): "Where a statutory authority is entrusted "with a mere power it cannot be made liable for any damage "sustained by a member of the public by reason of a failure "to exercise that power." Mr. Clothier said that in the present case the corporation, by reason of the five matters to which I have referred, had more than a "mere power" and, therefore, that the general rule did not apply, but the phrase "mere power" as used by Lord Romer cannot, in my opinion, be used to support such an argument. It clearly means a bare power or, in other words, something which, on the true construction of the relevant statute, does not impose a duty. In my opinion, therefore, that part of the judgment of the

(1) [1941] A. C. 74, 102.

learned judge in which he held the corporation liable cannot be supported either by the reasons which he gives or by the arguments presented in support of it by Mr. Clothier, and the appeal of the corporation must be allowed.

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DU PARCQ L.J. I have had an opportunity of reading the judgment which has just been delivered and I have only to express my complete concurrence with it.

LORD GREENE M.R. I am authorized by BIRKETT J. to say that he has read the judgment which I have just delivered and agrees with it.

Appeal allowed.

Solicitors for Nelson Corporation: *Torr & Co., for F. W. Roberts, Nelson.*

Solicitors for Fryer & Co. (Nelson), Ltd.: *Littledale & Lefroy, for Southern, Ritchie & Southern, Burnley.*

Solicitors for the plaintiffs: *Robinson & Bradley, for Oddie & Roebuck, Nelson and Blackburn.*

H. C. G.

F. P. H. FINANCE TRUST, LIMITED (IN LIQUIDATION) v.
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Feb. 8, 9, 10;
Mar. 12.

Revenue—Sur-tax—Investment company—Income consisting “mainly of “investment income”—Relevant period for receipt of income—Trading loss greater than investment income—Finance Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 34), s. 20, sub-ss. 1, 6 (a), (b).

In ascertaining whether a company is an “investment company” within s. 20, sub-s. 1, of the Finance Act, 1936, the test is whether or not the income of the company consisted mainly of investment income during the financial year in question, and it may, therefore, be an investment company at one time and not at another. When a company's trading loss exceeds its investment income for a financial year, and it obtains relief under s. 34 of the Income Tax Act, 1918, and recovers the tax deducted at source from the interest and dividends on its investments, although it has no taxable or aggregate income, it has an “investment income,” and its income “consists mainly of investment income” within the meaning of the sub-section:—

So held by the Court of Appeal (Goddard and du Parc L.J.J., Scott L.J. dissentiente), affirming Macnaghten J.

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APPEAL from Macnaghten J.

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The appellant company's trade consisted of buying and selling securities, and of indemnity issues and other financial business. For the years ending March 31, 1931 and 1932, it made trading losses of about 9000*l.* and 11,000*l.* For the next three periods of twelve months and the succeeding twenty-one months, ending December 31, 1936, it traded at a profit amounting in all to nearly 1,000,000*l.*, but in the twelve months ending December 31, 1937, it made a loss of 412,466*l.*, and for the next three months a further loss of 72,202*l.* During this period of eight years the company's investment income was negligible for the first two years. For the next four accounting periods—the last being twenty-one months—it received, in round figures, a gross investment income of 5000*l.*, 9000*l.*, 15,000*l.* and 225,000*l.*, and in the last two periods of twelve months and three months 82,145*l.* and 11,668*l.* On April 1, 1938, the company passed a special resolution for voluntary winding-up. For the fiscal year 1937–1938 the company claimed relief under s. 34 of the Income Tax Act, 1918, by reference to the trading loss of the last fifteen months before the winding-up. The claim was allowed and the Inland Revenue Commissioners re-imbursed to the company the tax deducted at source from the investment income, so that, in fact, the company paid no tax on its dividends for those two periods. A direction for the year of assessment 1938–1939 was given by the Special Commissioners under s. 20, sub-s. 6 (b), of the Finance Act, 1936, to the liquidator of the company, to which, admittedly, s. 21 of the Finance Act, 1922, applied, that its actual income from all sources should be deemed to be the income of its members, the amount apportioned and sur-tax assessed and charged accordingly. The direction was upheld by the Special Commissioners and Macnaghten J. and the company appealed. There was no suggestion that the company had been formed, or its business conducted or its accounts framed, to enable its members to avoid sur-tax. The sole issue on the appeal was whether the company was an “investment company” within the meaning of s. 20, sub-s. 1, of the Finance Act, 1936 (1). The

(1) By Finance Act, 1936, s. 20, sub-s. 1: “The following provisions of this section shall have effect as respects companies (hereafter in this section referred to as ‘investment com-

panies’) the income whereof consists mainly of investment income, that is to say, income which, if the company were an individual, would not be earned income as defined in sub-s. 3

Crown contended that the company was such a company because at the date of the liquidation it was, and for fifteen months previously had been, deriving income solely from investments. The company contended that it was not an investment company on the grounds: (1.) that a sufficiently representative period of time must be taken to justify the inference, and (2.) that, in any case, the income of a company could not consist mainly of investment income, when, in fact, it had no income.

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Tucker K.C. and *Heyworth Talbot* for the company.

Sir D. Maxwell Fyfe S.-G., *J. H. Stamp* and *R. P. Hills* for the Crown.

Cur. adv. vult.

Mar. 12. The following judgments were read.

SCOTT L.J. In my view, this is not a case where the individuals behind and in control of the company are in any sense within the mischief to the remedy of which this part of our taxing legislation is addressed. If they are hit, it is not because they are aimed at, but because they just happen by accident to be within the line of statutory fire. In short, it is important to clear our minds of any subconscious prejudice due to a suspicion that the appellant company is just one more example of the devices for tax evasion against which Parliament has been obliged to provide so many different counter-devices for the protection of the revenue since it passed s. 21 of the Finance Act, 1922. The company

" of s. 14 of the Income Tax Act,
" 1918 "

Sub-s. 6: " Where an
" order has been made or a
" resolution passed for the wind-
" ing-up of an investment com-
" pany to which s. 21 of the
" Finance Act, 1922, applies, the
" following provisions shall have
" effect:—(a) the actual income
" of the company from all sources
" since the date of the order or
" resolution shall, for purposes
" of assessment to surtax, be

" deemed to be the income of the
" members; (b) the Special Com-
" missioners shall from time to
" time by notice in writing to
" the liquidator direct that the
" amount of that income for the
" year or period specified in the
" notice shall be deemed for those
" purposes to be the income of
" the members for that year or
" period, and the amount thereof
" shall be apportioned and sur-
" tax assessed and charged
" accordingly "

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is admittedly a private company controlled by not more than five individuals, and, therefore, one to which the legislation in question can apply. The only question is whether it does apply. Equally, no question of company law or policy about one-man companies comes even remotely into the field of relevance. That topic is in no way germane to the sur-tax question into which we have to inquire to-day.

Before us two main contentions were urged on behalf of the company. The first was that the company was not an investment company because throughout its business life, and, anyhow, during its last eight years, it had obviously been an ordinary financial trading company and could not, or, at any rate, on the proved facts, did not, change its nature, either because or when its business, though still continuing, became unprofitable and had to be carried on at a loss instead of at a profit. Conversely, they put their argument in the positive form of a contention that a substantial length of time must elapse in order to constitute a sufficiently representative period to justify an inference that the company had changed its character. They urged further that, even if the criterion laid down in the sub-section by the words "the income whereof "consists mainly of investment income" in contrast with "earned income," ought to be regarded as a definition, the word "consists" imports not a momentary phenomenon, but something persistent and habitual. Their second contention was that, even if a mere moment of time has to be regarded, it could not be said of *this* company at any relevant moment, however chosen, that its "main" income had any particular character, for the simple reason that it had no income at all, its total income having been reduced by its trading losses to less than nothing, and to speak of its investment income as having a positive existence when its trading loss so far overbalanced it as to cause a minus result, is so absurd as to make it impossible to conclude that Parliament can have intended it. I confess to a feeling of sympathy with this common-sense argument, but the answer of the Solicitor-General is formidable. His first criticism is that the company's second contention misinterprets the word "income." In income tax legislation that word must be construed in its income tax meaning, that is, as income assessed and charged under one or other of the five schedules, unless it is expressly qualified as "total income," or "total income from all sources," or "aggregate income." Consequently, as the company's

investment "income" had been taxed by deduction at the source, and properly so taxed, it remained and still was income. Further, as by reason of its trade losses, the company had no "income" of the sch. D kind, and no other kind of income was suggested, the investment income was not merely the company's "main" income, but its only income. The Solicitor-General then proceeded to answer the company's first argument, namely, that the company could not in a moment of time suddenly change its character, or, as I ventured to suggest to Mr. Tucker, change its colour like a chameleon. A representative period must be taken, which, on the facts of the present case, would reach back into the company's profitable trading years. The Solicitor-General's answer was in effect that the appellation "investment company" is not a substantive description, but a mere label adopted for drafting convenience to facilitate subsequent references, and that s. 20, sub-s. 1, says nothing about the character of any company, but merely enacts that if the income of any company is "mainly" derived from investments the statutory consequences will automatically follow, including the appellation "investment company." He then took what he regards as his final step in logic by pointing to the fact that the company still possessed for purpose of charge its investment income as shown in the assessment which in the absence of appeal had become "final and conclusive."

The case so presented to us by him appeared powerful, and I confess to having found it difficult to meet. It seemed so faithfully to comply with the language of the section, and yet the result was so much at variance with the object of the legislation in a case like the present, where there is not a single symptom of the mischief against which this special legislation has been directed, that I hesitated to accept his argument as sufficient, and, on the whole, I have come to the conclusion that it is wrong. Mr. Talbot, in his reply, gave us the clue to what I think, though not without doubt, is the true solution. It is to be found in the Finance Act, 1927, s. 42, sub-s. 4, and the application of that provision to an "adjustment" of income (or of tax on income as per s. 40, sub-s. 1, of the Finance Act, 1927) under s. 34 of the Income Tax Act, 1918. Sect. 42 occurs in the fasciculus of sections, 38 to 47, constituting part III. of the Act of 1927 which effected the change from super-tax to sur-tax. Sect. 38 was

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concerned with total income from all sources, just as was s. 5 of the Income Tax Act, 1918. Sect. 42, sub-s. 1, made sur-tax "due and payable as a *deferred instalment of income tax* "on or before January 1 next after the end of the year of assessment for which it is payable," but sub-s. 2 is as follows: "Sur-tax shall be assessed and charged by the Special Commissioners, and, notwithstanding anything in the Income Tax Acts providing for the separate assessment of income arising from different sources, shall be assessed and charged "in one sum." The important sub-section, however, is sub-s. 4, which provides: "Where an assessment to income tax made at the standard rate has under the provisions of the Income Tax Acts become final and conclusive for any year, the assessment shall also be final and conclusive for the purpose of estimating total income for the purpose of sur-tax for that year, and no allowance or adjustment of liability on the ground of diminution of income or loss shall be taken into account in estimating the total income for that purpose, unless that allowance or adjustment has been previously made in respect of the income tax charged at the standard rate on an application under the special provisions of the Income Tax Acts relating thereto." That sub-section is (save for slight changes of phraseology due to one or two later Finance Acts which are immaterial for present purposes) an exact repetition of s. 5, sub-s. 2, of the Act of 1918. Its effect is to make an assessment under one or other of the schs. A to E, which has become final and conclusive for income tax purposes by reason of there having been no appeal from the general or additional commissioners, also final and conclusive for sur-tax, but subject to the extremely important exception of an adjustment of liability in respect of income tax made "on an application under the special provisions of the Income Tax Acts relating thereto." The relevant "special provision" in the present appeal is s. 34 of the Income Tax Act, 1918, under which the repayment was in fact made to the company of the tax deducted at the source on its investment income. The wording of s. 34 is an application "for an adjustment of his liability by reference "to the loss and to the *aggregate* amount of his" (the taxpayer's) "income for that year estimated according to this "Act." On such an application being granted sub-s. 2, s. 34, makes repayment of income tax obligatory.

If it be said that there remains any ambiguity in s. 42.

sub-s. 1, of the Act of 1927, which adds a further doubt about my solution, I think the general considerations which I stated in the earlier part of this judgment justify a beneficial interpretation of the sub-section in favour of the taxpayer. In this context it is worth noting that, as the old super-tax was an "*additional* duty of income tax" (see Income Tax Act, 1918, s. 4), so sur-tax is a deferred instalment of income tax. In either case whether s. 5, sub-s. 2, of the Income Tax Act, 1918, or s. 42, sub-s. 4, of the Finance Act, 1927, be considered, if the income tax foundation on which the higher tax rests be removed, the superstructure of super-tax or sur-tax cannot be left in the air. It, too, ceases to exist.

For these reasons I am of opinion, though with doubt, that this appeal should succeed with costs here and below; that the judgment of Macnaghten J. be set aside; and that the case be remitted to the Special Commissioners to act accordingly, but my brethren think otherwise, and the order will be as they direct.

GODDARD L.J. The appellant company was at all material times one to which s. 21 of the Finance Act, 1922, applies, and the question in the case is whether it is also an "investment company" within s. 20 of the Act of 1936.

A company is an investment company if its income consists mainly of what in the case of an individual would not be earned income. This company carried on a business of buying and selling stocks and shares, and, like all companies carrying on such a business, it had large holdings of securities from which it derived a dividend income. For two years ending March 31, 1931 and 1932, it traded at a loss. For the next three periods of twelve months and the succeeding twenty-one months ending December 31, 1936, it traded at a considerable profit. For the twelve months ending December 31, 1937, and the succeeding three months it sustained large losses on its trading, far exceeding what it received from its investments. On April 1, 1938, it went into voluntary liquidation. The special commissioners have held that for the fifteen months before liquidation it was an investment company and have upheld, as has Macnaghten J., a direction made on it for the year of assessment 1938-1939, under the provisions of the two sections referred to above. It is objected that there was no evidence on which the commissioners could find that this was an investment company

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because, it is said, they must not only look at that period of fifteen months, but must take what was called a representative period, by which I understand is meant that they ought to survey some period anterior to that in which the company made a loss, and, if they find, as they must have done, that the company was then in receipt of a trading income in excess of its investment income, they must find that it was not an investment company. One difficulty in accepting this argument is that no one could suggest any test as to what is a representative period, but the overriding difficulty, in my opinion, is that to do so would be to substitute a different test for ascertaining what is an investment company from that which the Act provides. The test is not whether the company had been carrying on or was continuing to carry on a business, but simply whether its income consists mainly of a particular class of income. Therefore, a company can be at one time an investment company and not at another. In my opinion, all that has to be regarded is the income during the financial year in question. Whether the test is satisfactory or whether it works hardship in a particular case is not a matter which can be taken into account. Suppose the figures showed that for three or four years this company's income had been mainly investment income and then for a particular year there had been a change and its income was mainly earned, I do not suppose the company would have contended that it remained for that year an investment company. On this point, I am of opinion that the decision, both of the special commissioners and of the learned judge, was right.

The second point raises more difficulty, but I agree with the special commissioners and the learned judge. The case is concerned with the period after the date of liquidation. It seems to me that the company had an income in the year 1937-1938, though not a taxable income. An individual often has an earned and an unearned income. If the earned income ceases because he makes a loss, but he receives money from his investments, in my opinion, he still has an income, though he will not have to pay tax on it if the loss exceeds the income. Sur-tax is a deferred instalment of income tax, so no one can have an income subject to sur-tax if he has not one on which income tax is chargeable. A company, however, does not pay sur-tax, and we have to consider, therefore, not whether its income is liable to sur-tax or even to income tax, but simply whether it has an income of a particular description.

If it has such an income, it is to be regarded for sur-tax purposes, not as the income of the company, but of its members.

In my opinion, therefore, the company was at the date of the liquidation an investment company, and, consequently, the direction against which the appeal is brought was validly given.

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DU PARCQ L.J. The question in this case is not whether the appellant company would normally be described as an "investment company," but whether it falls within the class of companies to which the label "investment companies" is applied by s. 20, sub-s. 1, of the Finance Act, 1936. If one reads into that section the material words from s. 14, sub-s. 3, of the Income Tax Act, 1918, the question assumes the following form: "Can it be predicated of this company that "its income consists mainly of income which, if it were an "individual, would not be charged under sch. D or the rules "applicable to sch. D?" (I omit for the sake of simplicity the words which provide that income, to be "earned income," must be derived from the exercise of a trade, profession or vocation.) If it is proper to look only at the period of fifteen months to April 1, 1938, in order to ascertain the *status* of the company, I think that there can be no doubt that the sch. D income was nil. The company, in fact, made a large trading loss.

The next question is whether the company had any income other than the sch. D income. If the answer to that question is "Yes," then it follows that its income "consists mainly" of non-sch. D income. The Crown says that the answer is "Yes," because the company received in dividends from its investments 82,145*l.* in the twelve months ending December 31, 1937, and 11,668*l.* in the three months ending April 1, 1938. For the company it is contended that the answer is "No," because although it received dividends they were not truly income. The company, it is said, had no income, because its trading loss swallowed up its "unearned" profits and left it with nothing. It is pointed out that for the purposes of taxation, an application could be, and was, made by the company which properly resulted in its paying no tax on its dividends. The tax deducted at source was returned to it. In my opinion, the contention of the Crown is right. The subject who "sustains a loss" in trade may apply to the commissioners "for an adjustment of his liability by reference "to the loss and to the aggregate amount of his income" for the year "estimated according to this Act": see s. 34

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of the Income Tax Act, 1918. It is, I think, true to say that the "aggregate amount" of the company's income over the fifteen months was nil, but, in my opinion, s. 20, sub-s. 1, of the Finance Act, 1936, requires us to look, not at the aggregate income, but at two categories of income (1.) earned and (2.) everything that is not earned, and to compare them. If under category (1.) we find a loss, and under category (2.) a profit, that is for this purpose immaterial, the object of the section being to classify a company according to the character of its income from various sources and not to arrive at the true aggregate of its income. If the company had made a profit of 5*l.* or 10*l.* by trading activities, and of many thousands in the form of "investment income," there could be no question that it would fall within s. 20, sub-s. 1. It appears to me that it is no less clearly within the sub-section when we find that instead of making a small profit it has incurred a heavy loss by its trading activities.

I have had the advantage of reading, and have carefully considered, the judgment of Scott L.J. I am unable, however, to agree with the view that s. 42, sub-s. 4, of the Finance Act, 1927, concludes the question. That sub-section relieves the payer of sur-tax as well as the income tax payer of liability in so far as an allowance or adjustment has been made on the ground of diminution of income or loss. For that purpose the taxpayer's "total income" has to be ascertained. For the reasons which I have already given I think that we are not here concerned with "total" income, nor are we concerned with the liability of the company to taxation. Its character has to be ascertained according to the rule laid down. If it is properly characterized as an "investment company" at the time when it goes into liquidation, from that time on its "actual" income (which, during the winding-up presumably will not be diminished by any trading loss) must be "deemed to be the income of the members."

The question remains whether it was proper to treat the fifteen months ending April 1, 1938, as the relevant period. If due regard is paid to sub-s. 6, of s. 20, it is, I think, clear that what has to be ascertained is the status of the company at the date of the winding-up. Was it then a company of the class referred to as "investment companies" in s. 20, sub-s. 1? I find it impossible to say that this question could not properly be answered by looking at the results of the company's activity during the last financial year and the few

months beyond the end of the financial year which ended in liquidation.

I feel the force of all that Scott L.J. has said as to the probable intention of the legislature and the inequitable result which may be thought to follow from the construction which I have adopted. It may be enough to say, with regard to these considerations, that, where the construction of a taxing Act appears to be reasonably plain (and in the present case I feel no real doubt about it), there is no room for speculation as to the policy of Parliament or the justice or injustice of the result. I would venture to add, however, that it is, I believe, notorious that the legislature does not always succeed in the difficult task of using language at once so comprehensive and so nicely adapted to every possible case as to achieve the ideal result that, while no one whom it is intended to tax shall ever escape, yet no one who has a reasonable claim to immunity shall ever be caught. I agree with Goddard L.J. that this appeal should be dismissed.

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Appeal dismissed.

Solicitors for the company: *Birkbeck, Julius, Edwards & Co.*

Solicitor for the Crown: *Solicitor of Inland Revenue.*

C. G. M.

HALCYON STEAMSHIP COMPANY, LIMITED v.
CONTINENTAL GRAIN COMPANY.

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Mar. 19, 22.

Shipping—Charterparty—Hire—Insurance—Increased rates for “trading belligerent”—Neutral destination—Call at belligerent port for bunkering.

A time charter provided that the charterers should pay a higher rate of hire per ton and insure the vessel for a larger sum if “trading belligerent” than if “trading neutral.” The charterers ordered the vessel to a neutral port for loading, calling en route at a belligerent port for bunkering only:—

Held, that the call for bunkering at a belligerent port did not alter the character of the adventure, which was “trading neutral” within the meaning of the charterparty, and the lower rates of hire and insurance were applicable.

APPEAL from Atkinson J.

By a time charter dated November 28, 1939, made between Halcyon Steamship Co., Ltd., owners of the Panamanian steamship *Halcyon*, and the charterers, Continental Grain Co.,

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it was provided: "4. The charterers shall pay for the use and hire of the said vessel at the rate of \$3.40 if neutral trading, \$3.70 if trading belligerent Mediterranean, and \$4.00 if trading belligerent other than Mediterranean per ton per calendar month. 38. Charterers are to insure vessel against war risk on valuation of 65,000*l.* sterling if trades neutral or belligerent Mediterranean, but if trades to other belligerent areas, valuation to be 80,000*l.*" The steamer carried a cargo from Norfolk, U.S.A., to Havre, where discharge was completed on April 4, 1940. She was then ordered by the charterers to proceed to Boston, U.S.A., at that time a neutral port, to load a cargo, and to bunker en route at Port Talbot, a belligerent port, as bunkers were not available at Havre. She, accordingly, went in ballast to Port Talbot, where bunkering was completed on April 13, and she waited for a convoy in which she left on April 16. Disputes having arisen between the owners and charterers as to the rates of hire and insurance applicable for the period April 5 to 16, resort was had to arbitration, and the umpire stated a consultative case under s. 9, sub-s. 1 (a), of the Arbitration Act, 1934, asking the following questions: "(A) Whether the rate of \$4.00 per ton was payable from April 5 to April 16 or part of such period. (B) Whether the charterers were bound to hand over cover notes for insurance on a value of 80,000*l.* before the vessel left Havre." Atkinson J. answered these questions in favour of the owners, and the charterers appealed.

Denning K.C. and *A. W. Roskill* for the charterers. "Trading" means "carrying cargo," and a voyage in ballast is not "trading" at all. "Proceeding to" and "trading" are not the same. Even if that contention fails, a mere call for orders or to bunker does not alter the character of the voyage. Atkinson J. based his decision on the danger of belligerent ports, especially from bombing, which exists equally whether a vessel is bunkering or loading cargo. That, it is submitted, is irrelevant. The degree of danger is not the test. The test is: "Is the vessel trading to a belligerent port or ports?"

Devlin for the owners was not called upon to argue the point whether "trading" was confined to "carrying cargo." On the question of the call at Port Talbot, the test was not whether the vessel was subject to seizure or penalty, which

she never would be while in ballast. The parties were obviously intending to provide for the increased risk attending a call at belligerent ports, whether from minefields, bombing or otherwise. They could not hope to measure the risk with scientific accuracy, so, as a rough and ready method, they took the ship's immediate destination as the decisive factor. If the immediate destination was belligerent, the vessel must pass through dangerous waters, and it was reasonable for the higher rate to attach. If the test was the ultimate destination, so that sailing in ballast for Boston was part of the voyage, one got into difficulties which were avoided by taking it in sections, and the smaller the sections it could be divided into, the nearer did the rates of hire and insurance approach the reality of the risk.

Denning K.C. in reply. Insurance had to be effected before the voyage began. That must mean the whole voyage, the nature of which is not altered by ports of call.

LORD GREENE M.R. MacKinnon L.J. will deliver judgment first.

MACKINNON L.J. The charterparty is of the usual inordinate length, but the material clauses are parts of cl. 4 and cl. 38, in which the draftsman appears to have entertained a great devotion to the words "trades" and "trading." The questions which we have to determine depend solely on the proper construction of these clauses. The judge has said that the shipowners are right in both their claims. I cannot agree with his conclusions. The use of the word "trading" by the draftsman is vague, but I think the reasonable view is that between April 5 and April 16, 1940, this vessel was trading to Boston and that her visit to Port Talbot was only an incident in that adventure. The view of Atkinson J. is that, if on that voyage to Boston, she calls at a belligerent port to bunker, or even, I suppose, for orders, she is trading to that belligerent port. That view I cannot accept. A cogent test is provided by imagining the converse case. If the vessel were loaded at Boston with a cargo deliverable at Bordeaux, she would clearly be "trading belligerent" and the charterers must pay the higher rate, but, if they added directions that she should call at Lisbon for orders or to bunker, she would, on the judge's view, be "trading neutral" all the way from Boston until she left Lisbon, and the

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charterers would escape with the lower "neutral trading" rate for nearly the whole of the voyage to Bordeaux. It is impossible to discuss this question at any length. I think that Atkinson J. was wrong, and that the answer to questions (A) and (B) should be: "On the facts found, the rate of hire "from April 5 to April 16 was \$3.40, and the insurance was "on a valuation of 65,000*l.*"

LORD GREENE M.R. I agree. It is clear from cl. 4 of the charterparty that the whole period of the charter is divided into periods of "neutral trading" and "belligerent trading," which itself is divided into "trading belligerent Mediterranean" and "trading belligerent other than Mediterranean." In other words, at any given moment the vessel must fall within one or other of those categories. How is the period of neutral trading or the period of belligerent trading to be defined? Is it to be defined by reference to the commercial purpose and destination of the voyage at a particular moment, or is it to be determined by a de facto destination without taking into account the fact that that de facto destination may be entirely incidental and fortuitous, such as a port of call for bunkers or for orders? In my opinion, the first is the true test, and I find that opinion strongly confirmed by the language of cl. 34, which shows clearly that the period which elapses between the time when the vessel is ready to receive cargo and the time when she sails from the discharging belligerent port is a period of "trading belligerent." If, during such a voyage, she puts in to a neutral port for bunkers, it would be impossible to argue that the period elapsing between the time when she was ready to receive cargo to the time when she left the neutral port, having bunkered there, must be treated as neutral trading because that would fly in the teeth of the clear language of cl. 34. I find in that clause what appears to me to be a conclusive argument in favour of the charterers' view.

GODDARD L.J. I agree with the judgment delivered by MacKinnon L.J., and also with the observations of the Master of the Rolls.

Appeal allowed.

Solicitors for charterers: *Sinclair, Roche & Temperley.*

Solicitors for owners: *Stokes & Mitcalfe.*

J. W. H.

ADAMS AND WATTS v. SOUTHALL RATING AUTHORITY.

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Mar. 23.

Rates—Recovery from owner of hereditament—"Person entitled to receive rent"—Right to recover from owner's agent—Middlesex County Council (General Powers) Act, 1938 (1 & 2 Geo. 6, c. xcix.), s. 118, sub-ss. 1, 2.

The expression "owner" in s. 118 of the Middlesex County Council (General Powers) Act, 1938, means the person who is entitled to receive the rent payable in respect of the hereditament ultimately and in his own right, and does not include an agent employed by the owner to collect the inclusive rent from the occupier and to pay the rates to the rating authority on behalf of the owner.

The proprietors of a block of flats agreed with the occupiers to pay the general rates on the flats and employed estate agents to collect the inclusive rents and to pay the rates to the rating authority on behalf of the proprietors. The estate agents were summoned by the rating authority for rates due :—

Held, that the estate agents were not liable for the payment of the rates.

CASE stated by Middlesex justices.

A complaint was preferred before a court of summary jurisdiction at Ealing, Middlesex, by the respondents, the rating authority for the borough of Southall, Middlesex, under s. 118 of the Middlesex County Council (General Powers) Act, 1938, against the appellants for that they, being persons duly rated and assessed to the rates set forth thereunder, amounting in all to 41*l.* 11*s.*, for which lawful demand had been made, had refused or neglected to pay that sum.

The appellants, Adams & Watts, were a limited partnership carrying on business as surveyors, valuers, estate and house agents. In November, 1939, while acting as agents for the proprietors of a block of flats at Southall to collect the rents from the occupiers thereof, they wrote to the respondents informing them that they were proposing to collect the inclusive rents from the occupiers and requesting the respondents to let them have in due course the applications for rates. Payment of rates was made in accordance with this arrangement. At the material time each of the flats was separately assessed for rating. Rates had been duly made and demanded from the appellants in accordance with the particulars set out in the complaint and the defendants had defaulted in payment. The justices ordered that a distress

C. A. warrant be granted against the appellants, but that it should
1943 be stayed pending this appeal.

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Comyns Carr K.C. and *Meston* for the appellants. There was no ground on which a distress warrant could issue against the appellants. *Prima facie* the occupier of a hereditament is liable for the rates on it, but by statute the owner may be rendered liable either in lieu of or in addition to the occupier. By s. 118, sub-s. 1, of the Middlesex County Council (General Powers) Act, 1938 (1), where the owner has agreed with the occupier that he (the owner) shall pay the general rate, the owner is liable to pay that rate. The words of s. 118, sub-s. 2, which defines "owner" are apt to describe the actual owner of the hereditament, but not an agent employed by him to collect the rent and to pay certain outgoings. A similar definition of "owner" occurs in sub-s. 11 of s. 4 of the Rating and Valuation Act, 1925, and the language of s. 118, sub-s. 1, should be compared with that of s. 11, sub-s. 4, of that Act. "Where . . . the owner is rated or has undertaken to pay "or collect the rates charged in respect of any hereditament, "the amount due from him in respect of the rates shall be "recoverable by the rating authority from him or, where the "rates are collected by an agent of his, either from him or "from that agent. . . ." It, therefore, required an express provision in the Act of 1925 to render an agent who collected rents liable for the rates. In any case, the appellants would only be liable for the proportion of rents in their hands which was attributable to rates. [*Nokes v. Strong* (2) was referred to.]

Harold B. Williams for the respondents. The appellants come within the definition of "owner" in s. 118, sub-s. 2, of the Act of 1938, as being persons entitled to receive the rents payable in respect of the flats.

(1) By s. 118, sub-s. 1, of the Middlesex County Council (General Powers) Act, 1938: "Where the "owner of any hereditament has "agreed with the occupier thereof "that the owner shall pay the "general rate charged on such "hereditament, the owner shall "be liable to pay to the council "of the district in which such "hereditament is situate so much "of any payment in respect of

"rent received by him from the "occupier as shall represent the "proportion of rate included in "such payment" By sub-s. 2: "For the purposes of "this section the expression "'owner' in relation to a here- "ditament means the person who "is entitled to receive the rent "payable in respect thereof."

(2) [1909] 2 K. B. 625.

CHARLES J. It has been contended for the respondent rating authority that the words "the person who is entitled "to receive the rent payable" in s. 118, sub-s. 2, of the Middlesex County Council (General Powers) Act, 1938, refer, not only to the person who receives the rent ultimately in his own right, but also to a person through whose hands the rent passes on its way to the proprietor, such as an estate agent employed to collect rents. That contention seems to me to be fallacious. The statute provides that the expression "owner" in relation to a hereditament means "the person "who is entitled to receive the rent." That means to receive and keep the rent as his own. If the proprietor of a hereditament, for convenience, asks the agent who collects inclusive rents for him to pay the due proportion of those rents for rates to the rating authority he is entitled to do so, but that does not render the agent liable under s. 118 as the person "entitled to receive the rent." The order for the issue of this distress warrant should not have been made, and the appeal must be allowed.

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TUCKER J. I agree. Prima facie the definition of "owner" in s. 118, sub-s. 2, of the Act of 1938, means a person who is entitled to receive rent in his own right. That that is the meaning to be attributed to "owner" in that section appears from the fact that when the legislature wishes to render agents who have collected rents liable for the payment of rates it uses very clear language to achieve that result. An example is to be found in s. 11, sub-s. 4, of the Rating and Valuation Act, 1925. In my opinion, it would want words as clear as those of that sub-section to render persons in the position of the appellants liable to pay the rates in respect of premises the rent of which they have merely collected as rent collectors on behalf of the owners. I agree that the order for the issue of a distress warrant should not have been made.

Appeal allowed.

Solicitors for appellants: *A. J. Adams & Adams.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for M. Lindsay Taylor, Town Clerk, Southall.*

C. G. M.

C. A. HARTSTOKE FRUITERERS, LIMITED *v.* LONDON,
1943 MIDLAND AND SCOTTISH RAILWAY COMPANY.

Mar. 29.

Railway—Carriage of goods—Owner's risk contract—Breach by railway company of condition as to notice of arrival—No wilful misconduct by company—Liability of company for damage to goods—Standard Terms and Conditions of Carriage, 1927 (St. R. & O. 1927, No. 1009), Owner's Risk Conditions, 3, 9.

By condition 3 of the Owner's Risk Conditions of the Standard Terms and Conditions of Carriage, 1927: "The company shall "not be liable for loss, damage, deviation, misdelivery, delay or "detention of or to a consignment or any part thereof, except "upon proof that the same arose from the wilful misconduct of "the company or their servants. Provided that nothing in this "condition shall exempt the company from any liability they might "otherwise incur in the following cases:— . . . (c) Misdelivery "where merchandise addressed in accordance with condition 1 "hereof is not tendered to or placed at the disposal of the consignee "within 28 days, or in the case of perishable merchandise within "a reasonable time which shall not be less than 72 hours after "receipt of the consignment by the company to whom the same "was handed by the sender."

By condition 9: "The company shall in every case when "merchandise is consigned to a station . . . and is not to be "delivered by the company's road vehicle, or barge, or by truck "alongside ship, give notice in writing (or by telephone, if so "agreed in writing) of arrival to the consignee . . ."

A railway company failed, without wilful misconduct on the part of its servants, to give notice under condition 9 within a reasonable time to the consignee of the arrival of perishable goods consigned to a station, and the consignee suffered loss through deterioration of the goods:—

Held, (1.) that this loss was "damage" from liability for which the company were exempted under condition 3, and that the consignee could not recover.

London and North Western Ry. Co. v. Neilson ([1922] 1 K. B. 192; [1922] 2 A. C. 263) distinguished.

(2.) that "misdelivery" in the proviso to condition 3 had its ordinary meaning of "delivery to the wrong person or place," and that failure to notify the consignee of arrival was not "misdelivery" within the meaning of that proviso so as to deprive the company of its exemption from liability.

APPEAL from Hallett J.

On September 5, 1940, Elders and Fyffes, Ltd., as agents for the plaintiffs, Hartstoke Fruiterers, Ltd., consigned to them two trucks of bananas, to be conveyed by the defendants, the London, Midland and Scottish Ry. Co., from Avonmouth Docks to Kew Bridge station, on the terms of two "owner's

"risk" consignment notes, embodying the Owner's Risk Conditions of the Standard Terms and Conditions of Carriage, 1927. The trucks arrived at Kew Bridge on September 7, but the defendants did not notify the plaintiffs of their arrival, either in writing or by telephone, until September 10, by which time the bananas were damaged by heat. The delay was not due to wilful misconduct on the part of the defendants' servants. The plaintiffs claimed damages for the loss they had suffered, alleging a breach by the defendants of condition 9 of the Owner's Risk Conditions, but Hallett J. held that the defendants were entitled to rely on condition 3 as exempting them from liability. The plaintiffs appealed. For the purposes of the appeal the plaintiffs abandoned the allegation of wilful misconduct (on which Hallett J. had found against them), and the defendants admitted "that they failed to give notice "of arrival by telephone within a reasonable time, and that, "in consequence, the plaintiffs incurred damages from loss, "damage, deviation, delay or detention of or to the consignments in question to the amount claimed."

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Macaskie K.C. and *O'Malley* for the plaintiffs.

Lynskey K.C. and *Gething* for the defendants.

The arguments appear from the judgment of Lord Greene M.R.

LORD GREENE M.R. Hallett J. held that where, by reason of a breach of condition 9, damage was suffered by the consignee, the railway company was, nevertheless, entitled to rely on condition 3, and, therefore, to be exempt from liability unless it were proved that the "loss, damage, deviation, "misdelivery, delay or detention," arose from wilful misconduct of the railway company or their servants. He did not specify the precise word in condition 3 under which the present case would fall, but, according to the natural meaning of language, it would seem to fall under the word "damage."

Prima facie the language of condition 3 appears apt to cover the present case and to protect the railway company from liability, but it is said that condition 3 cannot apply where condition 9 has been broken. The argument is put in two ways. First, it is contended that when the company commits a breach of condition 9 it goes outside the contract of carriage, and, accordingly, is not entitled to the limiting benefit of condition 3. *London and North Western Ry. Co. v. Neilson* (1)

(1) [1922] 1 K. B. 192; [1922] 2 A. C. 263.

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is relied on in support of that proposition, but that was a totally different case. There the railway company, having accepted goods consigned from one place to another, conveyed them to quite different destinations. By so doing they were not performing the contract of carriage at all. Therefore, they were not entitled to the protection of words inserted to limit their liability. In the present case the company had performed its contract of carriage by carrying the goods to Kew Bridge station. The provision of condition 9 is merely an ancillary provision which does not bear on the contract of carriage, but enables the consignee to be notified that the carriage is at an end and that he can fetch his goods. It is of further importance in the machinery of these conditions, because condition 10 provides that, at the expiration of one clear day after notice of arrival is given, the transit is at an end, and the effect of the transit being at an end is, by condition 11, that the railway company from that moment hold the goods as warehousemen, with certain special provisions as to their obligations in that capacity. I cannot regard a breach of condition 9 in the circumstances of the present case as in any way parallel or similar to the complete departure from the contract of carriage which took place in *London and North Western Ry. Co. v. Neilson* (1).

It was then said that condition 3 is not apt to cover damage to the goods caused, not by some act of the railway company in the course of transit, but by reason of their failing to serve a notice which would enable the consignee to collect the goods—in other words, that condition 3 does not apply after the transit has come to an end. That is a construction which I am unable to accept. It would have the remarkable result that until the goods arrived at their destination the railway company would be protected by condition 3, and that on the expiration of one clear day after the notice of arrival had been given the company would be protected by the special warehousing conditions in condition 11, but in the interval between those two points of time condition 3 would have no application, and would not protect the company. I cannot see how it is possible to limit condition 3 in that way. I am, therefore, of opinion that the judge came to the right conclusion on the argument presented to him.

An additional argument was put before us. Condition 3 exempts the company from liability for the matters mentioned

(1) [1922] 1 K. B. 192; [1922] 2 A. C. 263.

except on proof of wilful misconduct. That limitation of liability is qualified by a proviso which says that the limitation is not to take effect in three specified cases, the third of which is "misdelivery where merchandise addressed in accordance with condition 1 hereof is not tendered to or placed at the disposal of the consignee within 28 days, or, in the case of perishable merchandise within a reasonable time, which shall not be less than seventy-two hours after receipt of the consignment by the company to whom the same was handed by the sender." It was argued that the present case fell within that paragraph, and that, in consequence, there was no necessity to prove wilful misconduct. "Misdelivery" it was said has a special meaning in that paragraph, namely, "failure to tender the goods or to place them at the disposal of the consignee within the period specified." In the present case it was said that perishable goods were not tendered or placed at the disposal of the consignee within a reasonable period, and that, therefore, there was a case of misdelivery within the meaning of the definition. In my opinion, that argument is based on a misapprehension as to the meaning of the paragraph. "Misdelivery" seems to me to mean misdeldelivery, and not delay or detention. It is contrasted in the opening words of the condition with delay or detention, and is clearly aimed at a different class of act. The reason why these periods are mentioned in the paragraph seems to me to be, that where the company have delivered the goods to the wrong person and do not get them back again and tender them to the right person or place them at his disposal within the stated period, the company are to be deprived of the limitation of their liability given by the opening words of condition 3. On the other hand, if, notwithstanding misdeldelivery, the company succeed in getting the goods back and within the period stated tender them, or place them at the disposal of the consignee, the company are entitled to the benefit of the exemption from liability in the opening part of condition 3, and the consignee, in order to recover, would have to prove wilful misconduct. That seems to be the clear meaning of that paragraph of condition 3. The word "misdeldelivery" is not to be construed in the very special way in which Mr. Macaskie would have us construe it. In *London and North Western Ry. Co. v. Neilson* (1) Scrutton L.J. spoke of the word "misdeldelivery" in a condition which in some respects was similar to that which we now have

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(1) [1922] 1 K. B. 192, 202.

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before us, although the particular paragraph which I am now discussing either was not present or was not relevant in that case. Scrutton L.J. said: "Nor, in my opinion, is the word 'misdelivery' an appropriate word to apply to the present facts. I cannot understand how Lord Alverstone in *Foster's* case (1) took the view that letting the fish remain in the train that was going on to Taunton was misdelivering them. The company there did not by so doing deliver the goods to anybody, for they remained in their own possession. Misdelivery means a delivery to a wrong person, and if you keep the goods yourself you do not deliver them at all." In the present case the railway company had not delivered the goods to anyone. They were still in the railway company's trucks on their own siding. In my opinion, therefore, that argument, which was not presented to the judge below, clearly fails. The appeal should be dismissed with costs.

MACKINNON L.J. I agree.

GODDARD L.J. I agree.

Appeal dismissed.

Solicitors for plaintiffs: *Russell & Arnholz.*

Solicitor for defendants: *Alexander Eddy.*

(1) [1904] 2 K. B. 306.

J. W. H.

C. A. J. LYONS AND COMPANY, LIMITED v. KNOWLES.
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Mar. 30.

Landlord and tenant—Lease—Assignment—Covenants by successive assignees directly with lessor to pay rent for residue of term—Failure of assignee in possession to pay rent—Liability of previous assignee for arrears.

Where on each successive assignment of leasehold premises the lessors in the deed by which they consent to the assignment obtain from the assignee a covenant that he will during the residue of the term granted by the lease pay the rent and observe the covenants and conditions on the part of the lessee contained in the lease, each successive assignee remains liable under his covenant to pay the rent until the end of the term granted by the lease, so that, on default in payment of the rent by the assignee in possession of the leasehold premises, any earlier assignee is liable for the arrears of rent.

Decision of Asquith J. [1942] 2 K. B. 317 affirmed.

APPEAL from Asquith J. (1).

By a deed dated January 15, 1924, the lessors, Joseph Lyons & Co., Ltd., demised premises known as Nos. 18, 19, 20 and 21 Jermyn Street, Westminster, to one Wilcox for a term expiring in March, 1976. Wilcox covenanted, by para. (p), "not to assign, transfer, underlet or part with the possession of the said demised premises or any part thereof without the previous consent in writing of the lessor first had and obtained . . . but so that such consent shall not be unreasonably withheld to any assignment or underletting to a respectable and responsible person, and every assignment or underlease or tenancy agreement shall contain a covenant by the assignee, underlessee or tenant, as the case may be, directly with the lessor, to pay the rent and observe and perform the covenants and conditions reserved by and contained in these presents, including a covenant not to further assign or underlet or part with the possession of the said premises or any part thereof without such consent as aforesaid, and in case of an assignment to pay the several rents and sums of money hereby reserved." By a deed of licence dated May 28, 1924, the lessors consented to the assignment of the premises by Wilcox to the defendant, Knowles, for the residue of the term granted by the lease. The deed contained the following paragraph: "(3.) The assignee hereby covenants with the lessor that he will henceforth during the residue of the term granted by the lease pay the rent thereby reserved and observe and perform the covenants and conditions on the part of the lessee therein contained and in particular will not at any time after the completion of the said assignment transfer or underlet or part with the possession of the demised premises or any part thereof without the consent in writing of the lessor for that purpose first had and obtained." By deed dated March 21, 1928, the lessors granted the defendant licence to assign the demised premises to Gordon Chambers Co., Ltd., for the residue of the term granted by the lease. This deed was mutatis mutandis in identical terms with that of May 28, 1924, and by para. 3, Gordon Chambers Co., Ltd., entered into a covenant in precisely the same form as in para. 3 of the earlier deed. Gordon Chambers Co., Ltd., having defaulted, the lessors claimed from the defendant arrears of rent and insurance premiums amounting to 1755*l.* 13*s.* Asquith J. held that each and every successive assignee was

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C. A. under a liability to pay the rent and observe and perform the
 1943 covenants in the lease for the whole residue of the term granted
 LYONS (J.) by the lease, and, therefore, gave judgment for the plaintiffs
 & Co. for the amount claimed. The defendant appealed.

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Denning K.C. and *Gahan* (for *H. C. Leon*, on war service) for the defendant. The defendant's liability for payment of rent ceased when the lessors accepted his assignees as tenants in his place. At common law a lessee ceased to be liable in debt as soon as his lessor accepted an assignee as tenant. Here the covenant entered into by the defendant has come to be performed by the defendant's assignee, and the defendant, therefore, has ceased to be liable on the covenant. If there was an intention to alter the position at common law, it should be done in clear and express terms. It is true that the defendant covenanted to pay the rent during the residue of the term, and, if he had assigned without consent, that obligation would have continued to bind him, but, as it is, the lessors consented to the assignment. [LORD GREENE M.R. The whole object of obtaining a covenant from an assignee is to put him in the same position as a lessee.] Only in a limited way. If the lessors, in consenting to an assignment by the defendant, wished to continue to hold the defendant liable on his covenant, they should have said so in express terms. Alternatively, it is contended that there has been a novation to be imported from the fact that the lessors accepted the new assignees and subjected them to the same covenant. If the lessors had retained the liability of the defendant, they would have been imposing on him a liability as surety. The common law position is laid down in *Walker's Case* (1) and *Wolveridge v. Steward* (2). [They also referred to *Thursby v. Plant* (3) and *Auriol v. Mills* (4).]

Wynn Parry K.C. and *F. W. Wallace* for the lessors were not called on to argue.

LORD GREENE M.R. I am quite unable to follow the argument that on its true construction the covenant entered into by the defendant with the lessors does not extend during the whole term of the lease. What other language could have been used by parties who desired to make the covenant extend during the whole of the term I am unable to imagine. The

(1) (1587) 3 Co. Rep. 22a.

(2) (1833) 1 Cr. & M. 644.

(3) (1669) 1 Wms. Saund. 230(b).

(4) (1790) 4 Term Rep. 94, 98.

form of the covenant is one by which the assignee of a lease puts himself into the same relationship contractually with the lessor as that of the original lessee. That is its whole object.

The argument for the defendant was put on two grounds. First, it was said that on the true construction of the licence of May 28, 1924, it was limited so that on a subsequent assignment by the defendant his liability would come to an end. For the reasons I have given such a proposition seems quite hopeless. Secondly, it was said that, assuming the covenant to have been of the nature which I hold it to have been in its origin, there took place a novation on the occasion of the assignment to the Gordon Chambers Co. under which the defendant was released from his covenant for the future and the Gordon Chambers Co. was accepted as the sole covenantors. The principles which govern novation do not require stating. If novation is said to rest not on an express contract but on an implication from the circumstances of the case, all the circumstances, the conduct of the parties, and the subject-matter must be taken into account to see whether the inference can be drawn that the parties intended to enter into a contract of novation. In the present case I am quite unable to see how it can be suggested that there was any animus novandi. The lessors had obtained a covenant from the defendant which would continue until they released it. A formal document embodying the licence to assign to Gordon Chambers Co., to which the defendant was a party, was drawn up in the most solemn way under seal. Not a word of any intention to novate is to be found in that document, not a word providing that the defendant was to be released from his covenant for the future. I find it difficult to imagine anything more cogently opposed to any inference of novation than the fact that the parties chose to put their contractual intentions into a formal document which expresses not the slightest intention to novate, a matter of such importance that they would be expected to include it in the document and not to leave it to be inferred from conduct or circumstances. That by itself is sufficient to my mind to negative any suggestion of novation. Furthermore, in relation to novation it is material to consider the real business nature of the transaction, and here that is obvious. When the defendant entered into his covenant, the lessee, Wilcox, remained liable on his covenant notwithstanding the assignment, but he might die or disappear and in those circumstances it would be of importance to the

C. A.

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C. A. lessors to have somebody continuing liable in his place for the residue of the term. Again, after the defendant had assigned, his assignees, although responsible at first, might become insolvent, and it is easily seen how important it would be for the lessors to have the full benefit of the defendant's covenant in such an event. Not merely is there no indication of any intention to novate, but to imply a novation would be to fly in the face of the obvious facts. The appeal must be dismissed.

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MACKINNON L.J. I agree.

GODDARD L.J. I agree.

Solicitors : *Rubinstein, Nash & Co. ; Bartlett & Gluckstein.*

H. C. G.

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Mar. 30.

STOTESBURY v. TURNER.

Arbitration—Costs—Discretion of arbitrator—Deprivation of successful claimant—Refusal of offer to settle claim made "without prejudice."

The applicant carried out certain work for the respondent, and on the completion of it he claimed that 113*5*l. 1*9*s. was owing to him. The respondent alleged that only 120*l.* 3*s.* 10*d.* was due, and the matter was referred to arbitration. At a preliminary meeting before the arbitrator on October 8, 1942, an informal discussion took place during which the respondent's solicitor informed the arbitrator of the efforts which had been made, without prejudice, to arrive at a settlement and stated that the respondent was prepared to increase an offer which he had previously made to one of 550*l.* in full settlement of the claim and costs. No conclusion was reached, and on October 15, the applicant's solicitors wrote to the respondent's solicitors a letter marked "without prejudice" in which the offer of 550*l.* was refused. At the hearing before the arbitrator this letter was included in the copy of the correspondence with which he was provided. In opening the case, the applicant's counsel was about to refer to the letter when the respondent's counsel objected on the ground that it was marked "without prejudice." The arbitrator, thereupon, said that it was useless to object as he knew of the offer which had been made. By his award he directed the respondent to pay to the applicant a smaller sum than the 550*l.* offered by the respondent. In dealing with the question of costs he said that he had taken into consideration the offer in settlement which had been made and refused, and he directed the applicant to pay the costs of the respondent and the costs of

the award and to bear his own costs. The applicant moved to set aside the award so far as it dealt with the costs :—

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Held, that the discretion of an arbitrator was the same as that of a judge and must be exercised judicially; that the arbitrator was wrong in taking into consideration what was said at the friendly discussion which took place without prejudice at the first informal meeting before him and the refusal of the respondent's offer contained in the letter marked "without prejudice"; and that, therefore, there were no materials on which he could properly exercise his discretion to deprive the applicant of his costs.

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MOTION to set aside award by arbitrator.

The facts are set out in the headnote.

Gorst for the applicant.

Percy Lamb for the respondent.

ATKINSON J. It is clear to my mind that whatever discussion took place at the preliminary meeting before the arbitrator must be deemed to have been without prejudice. For the moment, the arbitrator ceased to be acting in the capacity of an arbitrator and became someone who was helping the parties to settle their differences. He was informed that many efforts to settle the matter had been made without prejudice and that the respondent offered 550*l.* in settlement, also without prejudice. At the actual hearing the letter of October 15, 1942, in which that offer was refused, was not, in my opinion, put in evidence with the consent of the parties. The moment it was referred to, counsel for the respondent objected that it was marked "without prejudice." Without ruling on the question of its admissibility, the arbitrator said that he knew all about the offer which had been made. What he really did was to permit his judgment to be influenced by the fact that an offer "without prejudice" had been made and refused. In those circumstances what power has a judge to interfere with the award?

Since the decision in *Lloyd del Pacifico v. Board of Trade* (1) it has been accepted that the discretion of an arbitrator to deal with costs is identical with that of a judge. Wright J. there said: "The discretion of an arbitrator to deal with costs depended on the incorporation in the submission of the provisions of the Arbitration Act, 1889. Those provisions were identical with the provision in Or. 65, r. 1, of the Rules of the Supreme Court and ss. 31 and 50 of the Supreme

(1) (1930) 46 T. L. R. 476, 477.

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"Court of Judicature (Consolidation) Act, 1925, which regulated the discretion of a judge of the Supreme Court. "The extent of a judge's discretion had been discussed in *Donald Campbell & Co., Ltd. v. Pollak* (1), and it was clear that that discretion could be exercised only judicially. He saw no reason why the duty of an arbitrator in exercising his discretion on the question of costs should in any way differ from the duty of a judge, and if in his award he stated reasons for which he had acted and the court could see from those reasons that he had not exercised his discretion judicially it ought to set the award aside." The principle to be followed was stated by Sterndale M.R. in *Ritter v. Godfrey* (2) where he said: "This was a case tried without a jury before the judge alone, and therefore in the absence of an order by him neither party is entitled to any costs. It therefore differs from a case tried before a jury, where there is a statutory right to costs if there be no order to the contrary. But there is such a settled practice of the courts that in the absence of special circumstances a successful litigant should receive his costs, that it is necessary to show some ground for exercising a discretion by refusing an order which would give them to him. The discretion must be judicially exercised, and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial. If, however, there be any grounds, the question of whether they are sufficient is entirely for the judge at the trial, and this court cannot interfere with his discretion." In the present case the arbitrator has stated in his award the reason why he exercised his discretion in the way in which he did, and it is plain that he based his decision on the ground that an offer had been made to the applicant of a sum which exceeded the amount which the arbitrator was prepared to award him, and that that offer had been refused.

The next case to which I was referred was *Civil Service Co-operative Society v. General Steam Navigation Co.* (3). There, at the trial before Bigham J., it appeared that there had been some negotiations for a settlement of the dispute and the judge expressed his desire that the matter should be left to him to say what, in the circumstances and apart from the strict legal rights of the parties, should be done. The defendants would not agree to that course being taken,

(1) [1927] A. C. 732.

(2) [1920] 2 K. B. 47, 52.

(3) [1903] 2 K. B. 756.

and they also declined to accept the judge's suggestion that they should be content to retain the amount of the expenses they had incurred and have their costs. In the result the judge gave judgment for the defendants, but ordered that each of the parties should bear his own costs. On appeal, the judgment for the defendants was affirmed, but on an appeal by the defendants from the order that each party should bear his own costs it was held by the Court of Appeal that there were no materials on which the judge could exercise his discretion by making that order, and, therefore that the Court of Appeal had power to entertain the appeal and reverse the decision. Lord Halsbury said (1): "It is an important question, and one which, in my opinion, this court has power to entertain. No doubt, where a judge has exercised his discretion upon certain materials which are before him, it may not be, and I think is not, within the power of the Court of Appeal to overrule that exercise of discretion. But the necessary hypothesis of the existence of the materials upon which the discretion can be exercised must be satisfied. In the present case, so far as the evidence before me goes, I can see no materials whatsoever upon which the learned judge could exercise a discretion at all. The defendants were sued, and rightly according to law resisted the suit, and finally succeeded. In the judgment of Bigham J. and in the judgment of this court, they are right; and it practically comes to this—that the learned judge has deprived the persons sued of what, *prima facie*, is their right to the costs of the litigation which has unsuccessfully been brought against them because they will not submit to the learned judge himself as arbitrator to say what should be done. That is not exercising a discretion upon materials properly before the judge; but it is depriving a litigant of rights of which he is by law possessed, upon grounds which it is not competent for the judge to treat as grounds for the exercise of his discretion." The other members of the court agreed with this statement of the law.

I was also referred to *Walker v. Wilsher* (2) in which it was held that letters or conversations written or declared to be "without prejudice" cannot be taken into consideration in determining whether there is good cause for depriving a successful litigant of costs. The case was a somewhat unusual one. The action was tried with a jury and resulted in a

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(1) [1903] 2 K. B. 756, 765.

(2) (1889) 23 Q. B. D. 335.

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judgment by consent for the plaintiff for an agreed sum. An application was then made to the judge to order that the plaintiff should be deprived of costs. In support of this application letters containing proposals for the settlement of the action, which had passed between the solicitors and were expressed to be "without prejudice," were produced and handed to the judge. The reception of the letters was objected to, but the judge acted on them and deprived the plaintiff of his costs. That decision was reversed in the Court of Appeal where it was stated in the plainest language that matters "without prejudice" could not be considered. Lord Esher M.R. said: "The letters and the interview were without prejudice, and the question is whether under such circumstances they could be considered in order to determine whether there was good cause or not for depriving the plaintiff of costs. It is, I think, a good rule to say that nothing which is written or said without prejudice should be looked at without the consent of both parties, otherwise the whole object of the limitation would be destroyed. I am, therefore, of opinion that the learned judge should not have taken these matters into consideration in determining whether there was good cause, and, as that was all that was before him on the point, if that is excluded, it follows that there was no good cause, and that the plaintiff should not have been deprived of his costs." The statement of Lord Esher that nothing which is written or said without prejudice should be looked at without the consent of both parties is emphasized by the observation of Romilly M.R. in *Hoghton v. Hoghton* (1), where he said that letters written without prejudice "with a view to an amicable arrangement ought to be held very sacred; for, if parties were to be afterwards prejudiced by their efforts to compromise, it would be impossible to attempt an amicable arrangement of differences." In *Scott Paper Co. v. Drayton Paper Works, Ltd.* (2), Clauson J. relied on the above statement when emphasizing the importance of disregarding matters which are stated to be without prejudice.

The only case analogous to the present of which I can think is one in which, as sometimes happens, counsel tell a judge that the settlement of an action which he is about to try is possible, and that the judge might assist if he would see them. They then go into the judge's room and counsel for the

(1) (1852) 15 Beav. 278, 321.

(2) (1927) 44 Pat. Cas. 151, 157.

plaintiff says that he thinks that his client ought to have 900*l*. The defendant's counsel offers to pay 600*l*. The judge may point out that the offer is a favourable one, and that, if the action is heard, the plaintiff may get less. If the suggested settlement comes to nothing, and after hearing the case the judge awards the plaintiff 500*l*., could anyone suggest that the judge would be entitled to say that because an offer of 600*l*. had been refused by the plaintiff he would order the plaintiff to pay all the costs of the action? The proposal to pay 600*l*., which I have imagined, is never before the judge in his judicial capacity, and in the present case the talk which took place in the presence of the arbitrator before the actual hearing began, would seem to be much on a par with the conversations between judge and counsel which I have mentioned. The matters dealt with at the preliminary meeting before the arbitrator were all without prejudice. The offer of 550*l*. was made without prejudice. The letter of October 15 refusing it was also written without prejudice. Even if counsel consented to it going in that did not change the nature of the offer which had been made, but I cannot see that these parties ever consented to the letter going in or being read by the arbitrator. The letter of October 15 was objected to by Mr. Lamb, and if the arbitrator had not said that he knew all about its contents, he would have been bound to rule that it could not be read. It is impossible to hold that the applicant, through his counsel, agreed to the letter being read as if it had been not without prejudice.

It seems to me that the arbitrator was wrong in giving any effect to the friendly talk which had taken place without prejudice and to the refusal of the offer which had been made. In my opinion, he had no material on which he could exercise his discretion in the way in which he did. The applicant had succeeded in obtaining an award for 350*l*., when the defence was that 120*l*. was enough. In other words, the arbitrator decided that the applicant was entitled to a substantial sum. If the matter had been heard by a judge, it would be impossible to say that the applicant had done anything which would justify the judge in depriving him of his *prima facie* right to costs. This motion asks that the award may be set aside and the matter remitted for further consideration, but as both parties have agreed that, if I should decide to set aside the award so far as it deals with costs, I should deal with the matter myself instead of remitting it to the arbitrator, my

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order will be that the award will be set aside in so far as it deals with the costs; that by consent each party shall pay half the costs of the award; and that the respondent shall pay the applicant's costs of this motion.

Award varied.

Solicitors for applicant: *W. R. Millar & Sons.*

Solicitors for respondent: *Wainwright & Co.*

P. B. D.

1943
Apr. 6.

LEWIS v. MOGAN.

Criminal law—Plea—Autrefois convict—Shipping offence by seaman—Absence without leave—Inquiry by master—Forfeiture of pay—Subsequent prosecution under Defence (General) Regulations, 1939 (St. R. & O., 1939, No. 927), reg. 47A (1.) (c)—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 114, sub-s. 2.

The respondent, a seaman serving in a ship requisitioned on behalf of His Majesty, was absent from his ship without leave. The master of the ship held an inquiry, and, as a result, made an entry in the log to the effect that the respondent was to forfeit one day's pay for neglecting his duty. On a subsequent date a charge of being absent from his duty without leave was preferred against the respondent before justices under reg. 47A (1.) (c) of the Defence (General) Regulations, 1939, in respect of the same incident. The respondent having pleaded *autrefois convict* by reason of the forfeiture of pay imposed on him by the master of the ship, the justices dismissed the charge:—

Held, that the plea of *autrefois convict* was not available to the respondent since the master of the ship, in fining him, was not acting as a court of competent jurisdiction, but as a domestic tribunal by virtue of the authority derived from the agreement entered into between him and the respondent under ss. 113 and 114 of the Merchant Shipping Act, 1894; that the respondent had never been tried for the offence of absence without leave from his duty constituted by reg. 47A (1.) (c); and that the case must be remitted to the justices for hearing and determination.

CASE stated by Liverpool justices.

An information was preferred by the appellant, Roger Lewis, acting for and on behalf of and with the authority of the Minister of War Transport, against the respondent, Gerard Mogan, "for that he being a person lawfully engaged to serve "on board the s.s. *Inventor* (a ship requisitioned by or on "behalf of His Majesty) was on October 1, 1942, at South-ampton absent without leave from his duty," an offence

under reg. 47A (1.) (c) of the Defence (General) Regulations, 1939 (1). When the charge was read to the respondent he pleaded "autrefois convict" by reason of the fact that under date October 3, 1942, the official log book of the steamship *Inventor* contained an entry, duly signed by the master and the chief engineer of the ship, in the following terms: "Date and hour of occurrence, 1.10.42. G. Mogan, No. 45, for neglecting "his duties all day, to forfeit a day's pay." The agreement made between the master and the crew of the ship pursuant to the Merchant Shipping Act, 1894, s. 114 (1) was produced at the hearing and proved. It was contended on behalf of the appellant that there had been no previous conviction or punishment of the respondent in respect of the offence charged, but merely a declaration that he was not entitled to wages for the day in question by reason of the provisions of s. 159 of the Merchant Shipping Act, 1894. The magistrates were of opinion that the plea of autrefois convict was available to the respondent and dismissed the charge. The appellant appealed.

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Arthian Davies for the appellant. The justices were wrong in holding that the respondent was entitled to avail himself of the plea of autrefois convict. There was no previous conviction of him by a court of competent jurisdiction. Any dealings between the master of a ship and a seaman in a matter of discipline are those of a domestic tribunal which the parties have agreed to accept under the agreement in accordance with s. 114 of the Merchant Shipping Act, 1894, and that has nothing to do with any court proceedings. If proceedings before the master of a ship could give rise to a

(1) Defence of the Realm (General) Regulations, 1939, reg. 47A (1.): "No person lawfully engaged to serve on board any ship to which this regulation applies shall . . . (c) be absent without leave from his duty at any time . . . (7). The ships to which this regulation applies are—(a) every ship belonging to His Majesty and every ship, whether British or foreign, chartered or requisitioned by or on behalf of His Majesty."

1894, s. 114, sub-s. 2, an "agreement with the crew" under s. 113, sub-s. 1, "shall contain as terms thereof the following particulars . . . (g) any regulations as to conduct on board, and as to fines, short allowance of provisions, or other lawful punishment for misconduct which have been approved by the Board of Trade as regulations proper to be adopted, and which the parties agree to adopt."

By Merchant Shipping Act,

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plea of *autrefois* convict, sub-s. 5 of s. 44 of the Merchant Shipping Act, 1906, which provides: "An act of misconduct "for which any fine has been inflicted and paid by, or deducted "from the wages of, a seaman shall not otherwise be punished "under the Merchant Shipping Acts," would be unnecessary. Moreover, the fact that s. 228 of the Act of 1894, provides that entries in the log shall be evidence in any subsequent legal proceedings clearly contemplates that the plea relied on in the present case was not available.

Astell Burt, for the respondent. The justices were right in holding that the respondent was entitled to plead *autrefois* convict. The entry in the log-book by the master was a finding that the respondent had been guilty of the offence of absence without leave from his duty on the day in question, and the forfeiture of pay was a punishment for that offence. The master was exercising the statutory jurisdiction conferred on him by the Merchant Shipping Acts and not a domestic jurisdiction founded on an agreement. The respondent had already been punished for the offence, and the proceedings before the justices were an attempt to try him again for the same offence on the same facts. Such a proceeding would be barred by the plea of *autrefois* convict. Further it is provided by s. 44, sub-s. 5, of the Merchant Shipping Act, 1906, that an act of misconduct for which a fine has been imposed shall not otherwise be punished under the Merchant Shipping Acts.

CHARLES J. The respondent was charged before the justices under reg. 47A (1.) (c) of the Defence (General) Regulations, 1939, with the offence of being absent without leave from his duty, but before that charge was preferred the master of the ship, as he was entitled to do, had held an informal inquiry into the respondent's conduct on the material date, had "logged" him for neglecting his duties all that day, and had ordered him to forfeit a day's pay. It was argued on behalf of the respondent that, as he had been dealt with in that way and for that offence by the master of the ship, he was entitled to plead *autrefois* convict in answer to the information preferred against him before the justices. In my view, that argument has no foundation when the true circumstances of the case and the relevant sections of the Merchant Shipping Act, 1894, are considered. The master's authority is derived from s. 114, sub-s. 2, of the Act which deals with the agreement which, by s. 113, sub-s. 1, and s. 114, sub-s. 1, has to

be entered into between the master of a ship and the seamen in a form approved by the Board of Trade. By s. 114, sub-s. 2 (g), it is provided that the agreement is to include "Any regulations as to conduct on board, and as to fines, "short allowance of provisions, or other lawful punishment "for misconduct which have been approved by the Board of "Trade as regulations proper to be adopted, and which the "parties have agreed to adopt." In the present case such an agreement had been entered into in the approved form. It was under these provisions and no other that the master of the ship ordered the respondent to forfeit a day's pay on the ground that he had neglected his duties all day. Turning to s. 159 of the Act one finds that "a seaman or apprentice shall "not be entitled to wages for any time during which he "unlawfully refuses or neglects to work." In the present case the respondent did neglect to work, and, acting well within his authority, the master decided that he should not receive his wages for the day on which he was not working. The argument for the respondent is that he cannot be charged under the Defence (General) Regulations because he has already been convicted and in effect fined for the same offence. It is necessary not to lose sight of the reasons for the making of the Defence Regulations, reasons which are set out in the Emergency Powers (Defence) Act, 1939, under which the regulations were made. The Act provides that "His Majesty "may by order in council make such regulations . . . as "appear to him to be necessary or expedient for securing the "public safety, the defence of the realm, the maintenance of "public order," and so on, and it is not surprising to find that there should be a regulation dealing specifically with matters to do with ships and those who go to the sea in them. Regulation 47A is not concerned with the question of a domestic agreement between the owners or the master of a ship and the seamen, but is directed to the defence of the realm and the public safety. The master of the ship in dealing with the respondent was not in any way acting as a court of competent jurisdiction. He was acting in a domestic way by virtue of the agreement between him and the crew which had been made under ss. 113 and 114 of the Merchant Shipping Act, 1894. The respondent has never been tried for the offence, now charged against him, of being absent without leave from his duty, and, in my opinion, the justices should have rejected his plea of autrefois convict. The matter must

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be remitted to the justices with a direction to them to hear and determine the case.

STABLE J. As this matter is going back to the justices, while expressing my entire concurrence with what has already been said by my Lord, I should like to add a few words so that there may be no possible misconception as to what was in the mind of each member of the court. With regard to the contention that the present proceedings are barred by s. 44, sub-s. 5, of the Merchant Shipping Act, 1906, which provides that "an act of misconduct for which any fine has been inflicted and paid by, or deducted from the wages of, the seaman, shall not otherwise be punished under the Merchant Shipping Acts," the answer is that, even assuming that the subject-matter of the entry in the log under date October 3, 1942, was identical with the subject-matter of the present charge, this charge is not under the Merchant Shipping Acts, but under reg. 47A (1.) (c) of the Defence (General) Regulations, 1939. The result is that s. 44, sub-s. 5, has no application to the matter. Whether the appellant would have been successful in this court if the prosecution in this case had been under the Merchant Shipping Acts, is a matter on which I express no opinion, but I venture to think that the point would require more careful consideration than it has been necessary for us to give to it in the case before us. On the question whether the respondent was entitled to plead autrefois convict, in my judgment, the short answer is that he was not, because the charge against him had never previously been dealt with by a court of competent jurisdiction. For these reasons and those already stated by my Lord, I agree that the case should be remitted to the justices.

Case remitted.

Solicitor for appellant: *Treasury Solicitor.*

Solicitors for respondent: *J. H. Milner & Son, for Silverman & Livermore, Liverpool.*

P. B. D.

REX v. GREENBERG.

C. C. A.

1943

Mar. 30.

Criminal law—Sentence—Misdemeanour—Sentence commencing at expiration of previous sentence—Criminal Law Act, 1827 (7 & 8 Geo. 4, c. 28), s. 10.

The power to pass a sentence of imprisonment to commence at the expiration of a previous sentence has always existed at common law where the offences for which the sentences were passed are misdemeanours, and, since the enactment of s. 10 of the Criminal Law Act, 1827, in the case of felonies, and it is immaterial whether the two sentences are passed in respect of charges made by separate indictments or separate counts in one indictment and tried at the same assizes or sessions or in respect of charges tried at separate assizes or sessions, or whether the offence for which sentence was last passed was committed before or after the offence for which sentence was first passed :—

Semble, when s. 10 of the Criminal Law Act, 1827, provides that it shall be lawful for the court to award imprisonment “for the subsequent offence” to commence at the expiration of the imprisonment for the earlier offence; “subsequent offence” should be interpreted as “subsequent conviction for an offence” and not as limiting the exercise of the power to cases where the second offence was committed after the commission of the offence for which the prisoner is already serving a sentence.

APPEAL against sentence.

In May, 1942, the appellant, Harry Greenberg, was convicted of a misdemeanour committed by him in December, 1941, and was sentenced to two years' imprisonment. On December 12, 1942, he pleaded guilty at Manchester Assizes to an indictment charging him with three further misdemeanours, committed by him before May 31, 1941, and was sentenced to twelve months' imprisonment, to commence at the expiration of the sentence of two years' imprisonment. He appealed on the ground that the judge had no power to pass such a sentence.

Glidewell for the appellant. At common law there was always power to make a sentence for misdemeanour commence at the termination of another sentence for misdemeanour: *Reg. v. Castro* (1), but in that case and other cases on the point the sentences had been passed in respect of offences charged in different indictments or separate counts in one indictment tried at the same assizes or sessions. Such

(1) (1880) 5 Q. B. D. 490; (1881) 6 App. Cas. 229.

C. C. A. sentences were necessarily consecutive, but the position is different where the sentences are passed at different assizes or sessions. Sect. 10 of the Criminal Law Act, 1827 (1), put felonies on the same footing as misdemeanours for this purpose: see argument in *Rex v. Hemming* (2). In any case, the court can only order a sentence to begin at the expiration of an existing sentence if the second sentence is in respect of an offence committed after the offence in respect of which the defendant is serving the first sentence, and that is not so here. In *Rex v. Wilkes* (3), the judges answered certain questions put to them by the House of Lords, but the answers were general without special reference to the facts of that case.

R. H. Blundell, for the Crown, was not called on to argue.

The judgment of the court (VISCOUNT CALDECOTE C.J., LEWIS and CROOM-JOHNSON JJ.) was delivered by LEWIS J. It has been argued that the court has power to postpone the commencement of a sentence for a misdemeanour to the expiration of a previous sentence which the prisoner is at the time serving only if the second sentence is in respect of a subsequent offence, that is to say, an offence committed after the date of the offence in respect of which the prisoner is at the time serving a sentence. Counsel for the appellant has called our attention to *Reg. v. Castro* (4), where it was held that it was proper to make the sentence for a second misdemeanour date from the expiration of the sentence for a first. Lord Selborne L.C., in delivering the leading opinion, said (5): "So far, therefore, my Lords, as relates to misdemeanours, "and, subject to the question whether this authority would "apply when the aggregate of the two punishments exceeds,

(1) Criminal Law Act, 1827, s. 10: "Wherever sentence shall "be passed for felony on a person "already imprisoned under sentence for another crime, it shall "be lawful for the court to award "imprisonment for the subsequent "offence, to commence at the "expiration of the imprisonment "to which such person shall have "been previously sentenced; and "where such person shall be "already under sentence either "of imprisonment or of trans-

"ered to pass sentence of trans-
"portation, may award such sen-
"tence for the subsequent offence,
"to commence at the expiration
"of the imprisonment or trans-
"portation to which such person
"shall have been previously sen-
"tenced"

(2) (1912) 7 Cr. App. R. 236.

(3) (1770) 19 How. St. Tr. 1075, 1136.

(4) 5 Q. B. D. 490; Affd. H. L. 6 App. Cas. 229.

(5) 6 App. Cas. 238.

“in point of time, that which there would have been power
 “to award for either offence alone, subject to that distinction,
 “the case of *Rex v. Wilkes* (1) in this House is clear and distinct
 “authority in favour of the proposition, that, when a man is
 “found guilty of two misdemeanours, being distinct and
 “separate offences (I apprehend it makes no kind of difference
 “whether it be by two indictments simultaneously tried
 “and found against him, or upon two counts in one and the
 “same indictment), there not only a competent but the proper
 “course was, and is, to pronounce a second sentence of
 “imprisonment (assuming it to be within the power of the
 “court as to duration), to commence and begin after the
 “expiration of the first.” In the view of the court there
 always was power in cases of misdemeanour to adopt such
 a course, and that is laid down in *Rex v. Wilkes* (1), where
 Sir John Eardley Wilmot, Chief Justice of the Common
 Pleas, delivered the unanimous opinion of the judges to the
 effect “That a judgment of imprisonment against a defendant,
 “to commence from and after the determination of an
 “imprisonment to which he was before sentenced for another
 “offence, is good in law.” In *Reg. v. Castro* (2), Brett L.J.
 commenting on the decision in *Rex v. Wilkes* (1) said (3):
 “The counsel for the plaintiff in error naturally attempted
 “to get rid of the force of the answer by the judges in the
 “House of Lords by referring to the circumstances, under
 “which *Rex v. Wilkes* (1) was decided. But when the
 “judges were consulted by the House of Lords, they were
 “asked an abstract question; and the question which they
 “were asked was whether a sentence of imprisonment,
 “to commence from and after the termination of an
 “imprisonment to which the defendant had been before
 “sentenced for another offence, was good in law. It is to be
 “observed that the answer has no reference as to whether
 “the sentences were passed for offences charged in one indict-
 “ment or in separate indictments. The question was general
 “in its terms, and the judges answered the question put by
 “the House of Lords in the very words in which it was asked,
 “and that answer was that a judgment of imprisonment
 “against a defendant may commence from and after the
 “determination of an imprisonment, to which he was before

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(1) 19 How. St. Tr. 1075, 1136.

(2) 5 Q. B. D. 400; Affd. H. L. 6 App. Cas. 229.

(3) 5 Q. B. D. 514.

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 1943 Sir John Eardley Wilmot in giving his reasons for the answer
 of the judges in *Rex v. Wilkes* (1), points out that any other
 course might lead to great injustice (2). We were also referred
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 practice was after *Rex v. Wilkes* (1).

There was no power, before the passing of the Criminal Law Act, 1827, s. 10, to adopt such a method in cases of felony for various reasons to some of which counsel has referred us, and counsel who argued *Rex v. Hemming* (4) in this court, where the point was raised but not decided, gave historic reasons why the case was different in questions of felony. In our view, in the case of misdemeanour, the power to do what was done in this case has always existed. Sect. 10 of the Criminal Law Act, 1827, is not applicable to this case, but if, as was said in *Reg. v. Castro* (5), the object of the legislature in enacting this section was to make applicable to cases of felony the existing power in the case of misdemeanour, it would seem that in cases of felony to which the section is applicable the words "subsequent offence" should be interpreted as "subsequent conviction for an offence," and not as limiting the exercise of the power to the case of a second offence which has been committed after the offence for which the prisoner is already serving a sentence. Having regard to the view which this court has taken, it is not necessary to decide that question, but we express our opinion with regard to it. This appeal must be dismissed.

Solicitors for appellant: *Janson, Cobb, Pearson & Co., for Dunderdale, Wignall & Co., Manchester.*

Solicitor for Crown: *Director of Public Prosecutions.*

(1) 19 How. St. Tr. 1075, 1136.

(2) Ibid. 1134.

(3) (1790) 1 Leach C. C. 529.

(4) 7 Cr. App. R. 236.

(5) 5 Q. B. D. 490; Affd. H. L.

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Mar. 9.

Workmen's compensation—Statutes of limitation—Applicability to Workmen's Compensation Acts—Limitation Act, 1939 (2 & 3 Geo. 6, c. 21), s. 2, sub-s. 1 (d); s. 2, sub-s. 3; s. 27, sub-ss. 1, 6; s. 31, sub-s. 1; s. 32.

The Limitation Act, 1939, has no application to proceedings under the Workmen's Compensation Acts since those statutes constitute a self-contained code outside the purview of the Limitation Act to which it was never the intention of Parliament that its provisions should apply. Proceedings before a county court judge sitting as arbitrator under the Workmen's Compensation Acts are not "an arbitration under an Act of Parliament" within s. 27, sub-s. 6, of the Limitation Act, 1939, and, therefore, the Act does not apply to them. In any event, the Workmen's Compensation Acts, which provide that notice of an accident must be given by the workman to his employers within a specified time and that a claim for compensation must be made within six months from the occurrence of the accident, prescribe a period of limitation for proceedings under the Acts, and, therefore, again, the Limitation Act, 1939, by s. 32, does not apply to those proceedings:—

So held by the Court of Appeal (Scott and du Parcq L.JJ., Goddard L.J. dissentiente).

APPEAL by the employers and cross-appeal by the workman from the decision of Judge R. A. Willes sitting at the Ilkeston county court as arbitrator under the Workmen's Compensation Act, 1925.

On February 5, 1913, the workman, Christopher Leivers, who was then seventeen and a half years of age, was injured in an accident arising out of and in the course of his employment as a pony driver at the employers' coal mine. He was incapacitated for five years and was paid compensation for total incapacity until June 6, 1918, when he was able to return and undertake light work as driver of a stationary electric engine. No agreement for the payment of compensation was ever recorded, but on his return to work the employers agreed to pay him three shillings a week as from June 9, 1918, as compensation for partial incapacity. On September 28, 1921, the employers stopped payment of the three shillings a week, without any agreement by the workman to abandon either his right to the payment or his right to have the weekly payment reviewed under para. 16 of sch. I. to the Workmen's

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Compensation Act, 1906, which was then in force. The workman continued to do the same light work until August 9, 1941, when he became totally incapacitated, admittedly as the result of the accident in 1913. On February 12, 1942, the workman filed a formal application for arbitration under the Workmen's Compensation Act, 1925, alleging that the employers had been under a legal liability to pay him compensation since September 28, 1921, and claiming a review of, and an increase in, the weekly payments for partial incapacity for the period February 12, 1932, to September 25, 1942, to which the workman confined his claim. The employers (inter alia) relied on the Limitation Act, 1939. The county court judge held that the workman was entitled to have the amount of the weekly payment reviewed, but that the Limitation Act, 1939 (1), applied to his claim since by s. 27, sub-ss. 1 and 6, the Act was stated to apply to arbitrations under Acts of Parliament as it applied to actions in the High Court. He further held that the workman's application was a proceeding founded on a statute, and accordingly, under s. 2, sub-s. 3, was subject to a limitation of twelve years as in the case of an action on a specialty, and he made an award in the workman's favour for an increased weekly sum as compensation for partial incapacity for the period February 12, 1932, to September 25, 1942. The employers appealed on the ground that the judge was wrong in holding that proceedings for the review of an award for compensation were founded on a specialty and not on a simple contract, and the workman cross-appealed on the

(1) By Limitation Act, 1939, s. 2, sub-s. 1: "The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:—(a) actions founded on simple contract or on tort (d) actions to recover any sum recoverable by virtue of any enactment"

Sub-sect. 3: "An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued."

Sect. 27, sub-s. 1: "This Act and any other enactment

"relating to the limitation of actions shall apply to arbitrations as they apply to actions in the High Court."

Sub-sect. 6: "This section shall apply to an arbitration under an Act of Parliament as well as to an arbitration pursuant to an arbitration agreement"

Sect. 31, sub-s. 1: "'Action' includes any proceeding in a court of law"

Sect. 32: "This Act shall not apply to any action or arbitration for which a period of limitation is prescribed by any other enactment"

ground that the judge was wrong in holding that the Limitation Act, 1939, applied to proceedings under the Workmen's Compensation Acts.

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Winning for the employers. The county court judge was right in holding that the Limitation Act, 1939, applies to proceedings by a workman for the review of an award made under the Workmen's Compensation Acts. He was, however, wrong in holding that the period of limitation applicable was twelve years as provided in s. 2, sub-s. 3, in the case of an action upon a specialty. The proceeding here was either an action to recover a "sum recoverable by virtue of any "enactment" within s. 2, sub-s. 1 (d), or it was an arbitration under an Act of Parliament within s. 27, sub-s. 1, in either of which cases the period of limitation applicable would be six years.

Lynskey K.C. and *Beney* for the workman. The county court judge was wrong in holding that the Limitation Act, 1939, applied. By s. 32 the Act is not to apply to any action or arbitration for which a period of limitation is prescribed by any other enactment. The Workmen's Compensation Act, 1906, is clearly an enactment containing a limitation since by s. 2, it requires a claim for compensation to be made within six months of the occurrence of the accident causing injury to a workman. If the Limitation Act, 1939, was rightly held to apply, the effect would be to impose two different periods of limitation. Assuming that the Act applies, the county court judge was right in holding that the period of limitation applicable is twelve years and not six, since the claim falls within s. 2, sub-s. 3, as being an action upon a specialty created by the Workmen's Compensation Acts, which alone give rise to the workman's claim.

Winning, in reply. The period of limitation referred to in s. 32 of the Limitation Act is a limitation of the time within which an action may be brought. The Workmen's Compensation Act, 1906, s. 2, does not impose any limitation on the time for taking proceedings. It merely provides that proceedings for the recovery of compensation shall not be maintainable unless a claim is put in beforehand, but a claim is not an action. If the claim is put in within the specified time, the proceedings can be begun at any time. It is clear, however, from the language of the Limitation Act, 1939, that it applies in the present instance. The proceeding for a review was an action

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1943. Mar. 9. The following judgments were read :

SCOTT L.J. [having stated the facts and dealt with other questions raised by the appeal which do not call for a report, continued:] There remains the very important controversy whether the Workmen's Compensation Acts are within or without the purview of the Limitation Act, 1939, and in particular (1.) whether the rights and remedies of the workman are or are not struck at by that Act, and (2.) if they are, whether the judge was right or wrong in holding that the claims which he has allowed are protected by the provision in s. 2, sub-s. 3, of the Limitation Act, 1939, about "specialties." It is contended by Mr. Winning, for the employers, that the proceeding for review in the present case is an action within s. 2, sub-s. 1 (d), of the Limitation Act, because it was a "proceeding in a court of law" within the definition in s. 31, sub-s. 1, of the Act, and that, therefore, it is barred under s. 2, sub-s. 1 (d), if the "cause of action" accrued more than six years before. He then submits that the proceeding was an arbitration under an Act of Parliament within s. 27, sub-s. 6, and that, consequently, under s. 27, sub-s. 1, the provisions of s. 2, sub-s. 1, about actions apply, with the result that, as the application for review was only filed on February 12, 1942, any "cause of action" which accrued before February 12, 1936, is barred.

In my view, the language of the Limitation Act itself is sufficiently clear to exclude the whole statutory system of the Workmen's Compensation Acts from its purview. Proceedings under them, whether by agreement or arbitration, are not, in my opinion, "actions to recover any sum recoverable by "virtue of any enactment" under s. 2, sub-s. 1 (d). The arbitrations which take place under the Workmen's Compensation Acts are not arbitrations to which s. 27, sub-ss. 1, 6 and 7 have any application, and, lastly, if they were, they would be under enactments which, for the purpose of the expression in

s. 32 of the Limitation Act, prescribe their own periods : see, for example, the Act of 1925, s. 14.

If there is, contrary to my view, any ambiguity about the matter in the Limitation Act, I suspect the reason is that neither Parliament nor the draftsman ever for a moment had in mind the idea that anybody would suggest that the Limitation Act should be read as applying to workmen's compensation. There are many reasons why it seems to me wholly inappropriate, and it may perhaps be useful to state some of them.

(1.) Out of the 3500 or so of reported cases which are quoted in the case index to Willis on Workmen's Compensation, I do not think there is one in which it has been suggested that the old statutes of limitations had any application to the Workmen's Compensation Acts.

(2.) The first Workmen's Compensation Act—that of 1897—and the Act of 1906 were, in each case, a self-contained code, intended primarily to be worked by agreement and without lawyers. As to the popular language and simple machinery, see Lord Halsbury's opinion in *Powell v. Main Colliery Co.* (1). Arbitration was only to be invoked in default of agreement. Disputes were not left to the arbitrament of the courts. In the Act of 1906 (to which I chiefly refer because it governs the present appeal) para. 4 of sch. II. excluded even the comparatively informal legal procedure of the Arbitration Act, 1889, and only gave compulsory powers with reference to witnesses and documents "as if the proceeding were an action in the "county court," and only for the purposes of execution provided that the memorandum of decision of the committee or of the award of the arbitrator or of the agreement between the parties might be recorded, and, if recorded, should be enforceable as a county court judgment : see the observations of Lord Sumner in *George Gibson & Co. v. Wishart* (2). This system is maintained throughout the Act of 1925 : see, especially, s. 21, sub-s. 1.

(3.) Special and appropriate protection was given by the Workmen's Compensation Acts to both parties which rendered unnecessary any assistance from statutes of limitation. Sect. 2, sub-s. 1, of the Acts of 1897 and 1906 imposed a double condition precedent to the workman's right, but also constituted a double limitation on the remedy, and just and reasonable qualifications to its rigours were added by the

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(1) [1900] A. C. 371, 372.

(2) [1915] A. C. 42, 44.

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proviso, similar to, though not identical with, the qualifications of the bar of the Limitation Act: see s. 26. Whether s. 2, sub-s. 1, of the Act of 1906, is sufficient strictly to satisfy s. 32 of the Limitation Act may be open to argument, although I incline to the view that it is, but, in any event, it is sufficiently germane to afford a powerful argument, if the construction of the later Act leaves the question in doubt. The Limitation Act is essentially a general Act. The statutory legislation about Workmen's Compensation is essentially special—whether the Act of 1897 or of 1925 be looked at. *Generalia specialibus non derogant*, as was held in *The Bishop of Gloucester v. Cunningham* (1), where this court decided that the general Rent Restriction Acts did not override or qualify the special legislation about parsonage houses.

(4.) If the Limitation Act applies to any Workmen's Compensation Act, it must apply to all. The Workmen's Compensation Act, 1897, was tentative, in that it only applied to workmen in certain occupations. The present statutory system of workmen's compensation insurance applies to the vast majority of the population. It has become a system of social insurance against accident and several widely spread industrial diseases, and as such is treated by Sir William Beveridge in his recent report. By it, statutory machinery has been brought into permanent operation in the United Kingdom under which a categorical obligation is imposed on the employer, where the accident or disease is within the Act, to pay compensation on a fixed scale not only for death but also for total or partial incapacity, and that latter obligation continues as long as the incapacity continues and varies in amount with it. The permanent power of either party to obtain a review, and the simple procedure under rr. 8, 9, and 10 of the Workmen's Compensation Rules, 1926, for either party to apply on any matter, afford in themselves great protection against the sort of risk, against which the statutes of limitation are intended to provide. When it is remembered that almost universally all claims under the Act come necessarily to the knowledge of the employer at once and that he always has the power of requiring the workman to submit to medical examination, it is difficult to see how he can fail to know what the claims are which are on his books and which it is his duty to include in his returns under s. 42: see also s. 10, sub-s. 5, and s. 15, sub-s. 3, of the Act of 1925. The principal

regulations (St. R. & O., 1913, No. 1092) made under s. 12 of the Workmen's Compensation Act, 1906 (now s. 42 of the Act of 1925), provide for the keeping by employers of books containing records of all cases of temporary or permanent disablement, and no case should go off the books until it has been disposed of in accordance with the Acts in force. Particulars have to be returned each year of the termination of each case: see Part 2 B (II. (i.) (ii.)) of the Forms of Return. The effect of these statutory provisions is that no employer ought ever to be in ignorance of what cases he has on his books. Information is always available to him, or ought to be if his books are properly kept in accordance with the Acts and regulations. The chief object of Limitation Acts is thus already achieved under the workmen's compensation code. Where the employer stops payment without a review and an order for termination, he has only himself to thank if the claim is allowed, through the ignorance or mistake of the workman, to drop for a time, and then is revived and appears to the employer to be stale.

(5.) The option given by the Acts to employers and workmen to contract out of their direct operation by substituting an agreed and certified scheme—in other words, to avoid the veto on contracting out (an option conferred by s. 3 of the Act of 1906 and now by s. 31 of the Act of 1925)—shows how little comparable the statutory system is to an ordinary action or contentious arbitration, whether under an "arbitration agreement" or a statute, to which the Limitation Act is directed.

(6.) The system of international arrangements for reciprocity in workmen's compensation also shews how self-contained, and thus special, the legislation is. The Workmen's Compensation (Transfer of Funds) Act, 1927, enacted pursuant to the resolution passed at the Imperial Conference of 1926 for reciprocity within the Empire, as appears from its preamble, and the two conventions with France and Denmark, entered into by Great Britain (Willis's Workmen's Compensation, 34th ed., pp. 996 to 1000) all illustrate the same feature.

For these reasons I am of opinion that, if I am wrong in thinking that the language of the Limitation Act is sufficiently clear to show an intention not to include the Workmen's Compensation Acts, then the ambiguity of its language should be resolved by so construing it either on the principle of *generalia specialibus non derogant* or on the ground that those Acts are not within the mischief aimed at by the Limitation

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Acts. Since writing this judgment I have read my brother Goddard's judgment. As he differs on the applicability of the Limitation Act to workmen's compensation, I am obviously wrong in thinking that its language clearly excludes such application, but I still think the ambiguity ought to be resolved in the way I have said, both for the specific reasons I have given with regard to the character of our legislation about workmen's compensation and on one or other of the two general grounds I mentioned just now. The judge was, I think, right in his conclusions on all questions except the Limitation Act, 1939, although I do not express any final opinion on the meaning of the word "specialty" in s. 2, sub-s. 3, of that Act. In view of my general conclusion, I think that the appeal should be dismissed, whatever the correct interpretation of the word "specialty" in the Act may be, because the cross-appeal should, in my opinion, be allowed.

Since this judgment was delivered my attention has been drawn to two cases under the Public Authorities Protection Act, 1893, *Fry v. Cheltenham Corporation* (1) and *Tuckwood v. Rotherham Corporation* (2), not cited to us at the hearing. Although that Act differs in some respect from the Limitation Act, 1939, they definitely support the view taken by du Parc L.J. and myself in the present case.

GODDARD L.J. (read by MACKINNON L.J.). The principal question raised in this appeal is whether the Limitation Act, 1939, applies to proceedings under the Workmen's Compensation Acts, and, if so, what is the appropriate period of limitation. In the county court it seems to have been accepted that the proceeding was a review. I have considerable doubt whether it was such a review as is contemplated by s. 12 of sch. I. to the Act of 1906, or s. 11, sub-s. 2, of the present Act, and, in any case, if the workman was relying on an unrecorded agreement, the proper course for him to take in the first place was to apply to record it: see per Scrutton L.J. in *Guest, Keen & Nettlefolds, Ltd. v. Williams* (3), and the recent case in this court of *Birch v. Pease & Partners, Ltd.* (4). Still, whatever was the true nature of the proceedings, and I will assume it was a review, the object was to recover a sum of money (and the workman did recover a considerable sum), and also to obtain a weekly sum in the future.

(1) (1911) 81 L. J. (K. B.) 41.

(2) [1921] 1 K. B. 526.

(3) (1925) 18 B. W. C. C. 68.

(4) (1941) 1 K. B. 615.

The first point to be considered is whether the Limitation Act, 1939, applies to workmen's compensation proceedings at all. It is said that the Workmen's Compensation Acts contain their own period of limitation, and so are excluded from the provision of the Limitation Act by s. 32 thereof. By s. 2 of the Act of 1906, now replaced by s. 14 of the Act of 1925, it is provided that proceedings for compensation shall not be maintainable unless notice of the accident is given as soon as practicable and unless the claim for compensation is made within six months from the date of the accident. Now, it is settled beyond all question that, in speaking of the claim for compensation, the Act does not mean bringing proceedings for compensation. Assuming for this purpose that the proceedings in question are either an "action" as defined in the Limitation Act or an arbitration to which that Act applies, in my opinion, the words in s. 2 of the Act of 1906, to which I have referred, cannot be regarded as imposing a period of limitation. I think they impose a condition precedent to the bringing of proceedings, but they do not limit the time within which proceedings can be taken. If the claim referred to in s. 2 of the Act of 1906 is not the same as an "action," s. 2 of the Limitation Act has no bearing on it. What the Act affects are the proceedings brought after the claim. Many instances are to be found where a statute has provided that notice of claim should be given, and at the same time imposed a period within which the action must be brought. The Employers' Liability Act, 1880, s. 4, for instance, requires that notice of injury should be given within six weeks and the action brought within six months, or, in case of death, within twelve months. It appears to me that the former requirement is in the nature of a condition precedent, and that the latter is a limitation. Then it was quite common to find similar provisions in Acts relating to public bodies before the Public Authorities Protection Act, 1893, repealed them and substituted a uniform period of limitation. This is now replaced by s. 21 of the Act of 1939. Take, for instance, s. 109 of the Highway Act, 1835. No action lay for anything done in pursuance of the Act unless twenty-one days' notice of claim was given to the proposed defendant to give the latter an opportunity of tendering amends, and the action had to be brought within three months of the cause of action. It is true that in workmen's compensation cases the employer has power to apply for arbitration as soon as he receives notice of claim, and so

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can protect himself against undue delay: *M'Cafferty v. McAndrews & Co., Ltd.* (1); but, when matters of positive law have to be considered, matters of hardship or convenience do not come into the question. All that has to be done is to construe the Act, and, in my opinion, it is wrong to regard s. 2 of the Act of 1906 as prescribing a period of limitation for proceedings although it does impose a condition precedent to taking proceedings for enforcing the claim. This, I think, was the opinion both of Lord Warrington and Lord Thankerton in the last cited case.

We have, therefore, to consider s. 2 of the Limitation Act. It can, I imagine, hardly be doubted that workman's compensation is money "recoverable by virtue of an enactment," every bit as much as, for instance, money recoverable by a workman under the Truck Acts: see *Pratt v. Cook, Son & Co.* (2), *Kenyon v. Darwen Cotton Manufacturing Co., Ltd.* (3). By s. 31 the word "action" is made to include any proceeding in a court of law. It is objected that proceedings under the Workmen's Compensation Act are an arbitration, and that, if any section of the Act is relevant, it must be s. 27 which I will consider later. Now, it is true that the Workmen's Compensation Acts provide for questions to be settled by arbitration, but it is arbitration of a very special and unique character. For this purpose there is no difference between the Acts of 1906 and 1925, but, as the former applies to this case, I shall refer to the provisions of that Act. Sect. 1, sub-s. 3, provides that, if any question arises in any proceedings under the Acts as to liability to pay compensation, or as to its amount or duration, the question, if not settled by agreement, shall be settled by arbitration in accordance with sch. II. By that schedule, unless there is a committee with power to settle matters under the Act and neither party objects to going before it, the matter is to go to a single arbitrator agreed on by the parties, or, in the absence of agreement, to the judge of the county court, according to the procedure prescribed by rules of court: paras. 1 and 2. The judge can, with the authority of the Lord Chancellor, appoint another person to act as arbitrator who will then have all the powers of the judge: para. 3. It is provided that the Arbitration Act, 1889, shall not apply, but provision is made for a committee or an arbitrator, that is, the single arbitrator

(1) [1930] A. C. 599.

(3) [1936] 2 K. B. 193.

(2) [1940] A. C. 437.

referred to in para. 2 of the schedule, to submit a question of law for the decision of the county court judge, and his decision whether on a case submitted, or where he himself settles the matter, is open to appeal to the Court of Appeal: para. 4. When the judge himself has dealt with the application, the appeal does not come before this court as one on a special case, but as an ordinary appeal to which all the provisions of the County Court Acts relating to appeals apply. The judge or an arbitrator appointed by him, but not a committee or an arbitrator appointed by the parties, are to have the same powers of procuring witnesses and production of documents as if the proceedings were an action: para. 4. Presumably, an arbitrator appointed by the judge could do so, because, as already stated, he has all the powers of the judge, and it is curious that para. 4 expressly mentions that arbitrator when dealing with the power of procuring witnesses and documents while para. 5, which empowers the judge to summon a medical referee to sit with him, does not. Neither a committee nor an arbitrator appointed by the parties seem to have this power, although under para. 15 they can submit a question to a medical referee for report. Paragraph 6 says that rules of court may make provision for the appearance in any arbitration under the Act of any party by some other person. Paragraph 7 deals with costs. Whereas they are in the discretion of a committee or an agreed arbitrator, in the case of a judge or arbitrator appointed by him they are in his discretion subject to rules of court, which means, in effect, according to county court scales, and they are to be taxed accordingly. Paragraph 9 is important as it provides that a memorandum is to be recorded of any matter decided or agreed and that the memorandum is to be enforceable for all purposes as a county court judgment. Paragraph 11 deals with the county court district in which proceedings are to be taken, and para. 12 makes the duty of the judge under the Act part of the duties of the county court and provides that the officers of the court are to act accordingly and for the making of rules by the committee of judges under s. 164 of the County Court Act, 1888.

These, I think, are the material provisions of the schedule bearing on the question we have to decide. It seems to me difficult to say that, when a matter under the Act is brought before the county court judge and is heard by him, it is not a "proceeding in a court of law," although it is not an action

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in the ordinary sense. It has often been recalled that the framers of the original Act hoped and believed that litigation would be avoided and that the Act in that respect would have results more beneficial than the Employers' Liability Act, 1880, which had provided so many problems for the courts. Hence, no doubt, the provision that disputes might go to a committee representative of employer and workmen, which, however, would only be likely to be set up in large undertakings. So, there was also a provision for an arbitrator to be agreed on by the parties. Whether there has ever been a reference to such an arbitrator I do not know, but it is common knowledge that at least the vast majority of disputes that arise go to the county court where they are heard, not behind closed doors as are arbitrations, but in open court. The result is embodied in an award, which, like any other award, can be enforced as a judgment, but, nevertheless, I do not think, because the Act creates the machinery or procedure of an award, that of itself prevents that which leads up to it from being a proceeding in a court of law. There are quite a number of proceedings in a court of law that are not judgments, but under which sums of money can be recovered, for instance, an order of the Divorce Division for costs: *Ivimey v. Ivimey* (1); or for alimony, whether interlocutory or final: *Bailey v. Bailey* (2).

Mr. Lynskey relied in support of his argument on *George Gibson & Co. v. Wishart* (3). That case emphasized the difference between an award under the Act and an ordinary judgment, and decided that, having made an award, the judge was not functus officio and that he had power on a review to direct termination of payments due before the date of filing the application, but I do not find that it assists me in the present case. More in point, in my opinion, is *Hunter v. Simmer* (4). This court had sent a case under the Act back for re-hearing, but in the order the expression "new trial" had been used. The case had originally been heard by the deputy county court judge, and the judge of the court declined to re-hear it on the ground that he could not re-hear an arbitration which had been heard by another arbitrator. The court, while agreeing that the word "rehearing" ought to be used, and not "re-trial," directed the judge to re-hear the case. Lord Sterndale M.R. said that "The matter,

(1) [1908] 2 K. B. 260.

(2) (1884) 13 Q. B. D. 855.

(3) [1915] A. C. 18.

(4) [1922] 2 K. B. 170.

"therefore, goes to the judge, not as an individual, sitting as arbitrator because he is that individual; it goes before him as judge of the county court . . . and I think it is the judge of the county court who is acting, and not the person who may at the time fill that office; in short a hearing by the deputy county court judge is the same thing as a hearing by the judge himself." It is worth noticing that the deputy judge had not been appointed an arbitrator by the judge with the consent of the Lord Chancellor under para. 3 of the schedule. He had sat as an ordinary deputy judge. In my opinion, this case supports the view that a matter under this Act is a proceeding in a county court, which is a court of law, and, accordingly, is within s. 2 of the Limitation Act.

Now, consider the case where the workman is injured and an agreement to pay compensation is recorded. If the employer fails to pay the weekly sum, the workman can apply to enforce the agreement as a county court judgment. Suppose the employer ceases to pay, for whatever reason, and the workman does nothing for, as in this case, some twenty years. If he then applies for the enforcement of the agreement as a judgment, it seems to me impossible to say that he can enforce it for a longer period than that allowed by the Limitation Act, namely, six years. As I said earlier in this judgment, if the payment has been made originally under an unrecorded agreement, it has been laid down in this court that, if he desires a review, his proper course is, first, to record the agreement, and then to apply to enforce it. If that be so, then it seems to me that he ought not to be able to avoid the statute of limitation or to get the advantage of a longer period of limitation by initiating proceedings for review without recording the agreement. An award, like an agreement, can be enforced as a judgment or order of the court: see Workmen's Compensation Rules, 1926 (St. R. & O., 1926, No. 448), r. 30, and this, I think, clearly covers awards made either on an original application or on a review. In my opinion, the combined effect of ss. 2 and 31 of the Limitation Act is to make proceedings in a court of law to enforce an award subject to a six years' limitation.

The learned judge has held that the statute does apply, but that a review is not a proceeding to recover a sum recoverable by virtue of an enactment under s. 2, sub-s. 1 (d), but is an action on a specialty. With all respect to his opinion, I cannot follow this reasoning. Historically the doctrine

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with regard to the period of limitation for a debt recoverable by virtue of an enactment, to use the words of the Act of 1939, seems to be this: The Limitation Act, 1623, so far as debts were concerned, applied to debts arising only out of simple contracts. Accordingly, very early in the history of the Act, it was held that it did not apply to a debt recoverable by virtue of a statute: *Talory v. Jackson* (1); *Jones v. Pope* (2). Debts due under any bond or other specialty were first made subject to a period of limitation by the Civil Procedure Act, 1833. Thereafter the courts regarded statutory debts as specialty debts and as subject to the same period of limitation. I think the first case in which this was expressly laid down is *Cork and Bandon Ry. v. Goode* (3). The Act of 1939 has, however, effected a material change in the law in this respect. Debts recoverable by virtue of an enactment are now subject to the same period of limitation as those arising from simple contract, while a different period is prescribed for specialties. In my opinion, therefore, "specialties" must now be confined to deeds or contracts under seal. As in these proceedings the workman, whether by review or otherwise, seeks to recover a sum of money, that is, the aggregate of weekly payments which he alleges ought to have been paid to him in the past and which are recoverable only by virtue of an enactment, in my opinion, six years is the appropriate period of limitation.

The employers contended that, if the proceedings are to be regarded, not as proceedings "to recover a sum recoverable "by virtue of an enactment," but as an arbitration, the same considerations apply by reason of s. 27 of the Act of 1939. The Act is to apply to arbitrations as it applies to actions: sub-s. 1. By sub-s. 6 of s. 27 this provision is applied to arbitrations under an Act of Parliament, and sub-s. 7 enacts that "arbitration," "arbitration agreement" and "award" are to have the same meaning as in the Arbitration Acts, 1889 to 1934. The only one of these expressions to which a meaning is attached by the Acts is "arbitration agreement," which is defined by s. 21 of the Act of 1934. By s. 16, sub-s. 1, of that Act it was expressly provided that statutes of limitation should apply to arbitrations, and that sub-section is repealed by the Act of 1939, as it was no longer necessary in view of s. 27. But the Arbitration Acts do not apply to proceedings under the Workmen's Compensation Act, and the only

(1) (1639) 4 Cro. Car. 513.

(3) (1853) 13 C. B. 826.

(2) (1666) 1 Wms. Saund. 34.

conclusion at which I can arrive is that the provisions of s. 27 do not apply to workmen's compensation proceedings. I would allow this appeal so as to confine the amount recoverable by the workman to weekly payments for six years from the time when he filed his application for review.

Since this judgment was prepared I have found that Lord Atkin discussed the nature of an award under the Workmen's Compensation Act, 1925, in *Lissenden v. C. A. V. Bosch, Ltd.* (1), and said, in terms, that the award of a county court judge is, for practical purposes, the equivalent of a judgment.

DU PARCQ L.J. The main question argued on this appeal is that of the applicability of the Limitation Act, 1939, to a claim made under the Workmen's Compensation Act, 1906.

It is provided by s. 32 of the Limitation Act, 1939, that the Act shall not apply to any action or arbitration for which a period of limitation is prescribed by any other enactment. I do not think that it can be doubted that, if one finds in an Act "a time limited for taking proceedings," that Act is an enactment by which a period of limitation is prescribed for those proceedings. If this be granted, the question whether the Workmen's Compensation Act, 1906, is such an enactment seems to me to answer itself, or rather, to have been answered for us by the legislature, because s. 1, sub-s. 4, of the Act contains the words: "If, within the time hereinafter in this "Act limited for taking proceedings, an action is brought," etc. The reference, of course, is to s. 2, sub-s. 1, so that the legislature at any rate, had no doubt that the effect of s. 2, sub-s. 1, was to limit the time for taking proceedings. It is true that the notice which the workman has to give and the claim which he is required to make may be informal in character, and it is true also that the claim is properly to be regarded rather as a necessary prelude or condition precedent to proceedings than as the initiation of proceedings, but in an Act which, in Lord Halsbury's words in *Powell v. Main Colliery Co.* (2), to which Scott L.J. has referred, "deliberately and designedly "avoided anything like technology," it is not, I think, surprising to find the legislature drawing no distinction between a claim which is the first step in proceedings and a claim which must be made before proceedings can be brought. In language which is plainly intelligible, Parliament has effectively prescribed a period of limitation. It has not used technical

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(1) [1940] A. C. 412, 425.

(2) [1900] A. C. 371, 372.

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language, or language which a lawyer might have been expected to choose, and I do not overlook the fact that in *M'Cafferty v. McAndrews & Co., Ltd.*, both Lord Warrington (1) and Lord Thankerton (2) say that the section in the Act of 1925 which reproduces s. 2, sub-s. 1, of the Act of 1906 (I am quoting from Lord Thankerton's speech) "does not limit the time "within which the proceedings under the Act are to be "brought," but "lays down two conditions precedent to such "proceedings." These observations (if I may respectfully say so) are, of course, a correct statement of the effect of the section in precise legal language. They do not, however, in my opinion, detract from the force of the argument that the language used by the legislature clearly indicates that it intended the Workmen's Compensation Act to be regarded as an enactment prescribing a period of limitation. For present purposes, the true answer to the question raised by s. 1, sub-s. 4: "What is the time hereinafter in this Act limited for taking "proceedings" cannot, in my opinion, be: "No time for "taking proceedings is limited."

It is true that the limitation applies only to "taking "proceedings" in the sense of taking a preliminary step, and that there are not separate periods of limitation for all subsequent applications for a review, but such applications are consequential on the original claim for arbitration and are affected by the prescribed period of limitation in the sense that, unless the first step is taken within that period, none of the later steps will be permissible.

For these reasons, I am of opinion that the Limitation Act has no application to the present case. I agree with Scott L.J. that the Workmen's Compensation Act, 1906, constituted, as does the Act of 1925, "a self-contained code," and that it was never the intention of Parliament that the Limitation Act should apply to proceedings under it. It follows that, in my opinion, the order of this court should be that proposed by my Lord.

Appeal dismissed. Cross-appeal allowed.

Solicitors for employers : *Johnson, Weatherall, Sturt & Hardy, for Parker, Rhodes, Cockburn & Co., Rotherham.*

Solicitors for workman: *Taylor, Jelf & Co., for Hopkin & Son, Mansfield.*

(1) [1930] A. C. 623.

(2) Ibid. 627.

ROBINSON v. ROBSON.

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Mar. 24.

Shipping—Offence by seaman—Absence without leave and drunkenness of seaman—Entry of offence in log-book—No copy of entry given, nor entry read over to, seaman—Admissibility of entry in evidence—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 228 (b); s. 239, sub-s. 6; s. 695, sub-s. 1—Defence (General) Regulations, 1939 (St. R. & O. 1939, No. 927), reg. 47A (1.) (b), (6.).

The respondent, a seaman lawfully engaged to serve on board a ship, was charged with being absent without leave from his ship, and, while on board, being in a state of drunkenness so that the performance of his duties was thereby impeded, contrary to reg. 47A (1.) (b), (6.), of the Defence (General) Regulations, 1939. An entry of the alleged offence was made in the official log-book, but the respondent was not furnished with a copy of the entry, nor was it read over to him, as provided by s. 228 (b) of the Merchant Shipping Act, 1894.

The entry was tendered in evidence before the justices, but they rejected it as inadmissible on the ground that the provisions of that section had not been complied with:—

Held, that the matters mentioned in s. 228 (b) were not conditions precedent to the admissibility in evidence of the entry in proceedings against the respondent before justices for offences under reg. 47A, (1.) (b), (6.), and, therefore, that the entry was admissible in evidence in those proceedings under s. 239, sub-s. 6, and s. 695, sub-s. 1, of the Act.

CASE stated by justices.

At a court of summary jurisdiction sitting at South Shields two informations were preferred by the appellant, Edward Norman Harrison, acting with the authority of the Minister of War Transport, against the respondent, John C. Robson, for that he being a person lawfully engaged to serve on board the British ship *River Afton* was, at Middlesbrough, on May 19, 1942, in a state of drunkenness whereby the performance of his duties was impeded, contrary to reg. 47A (6.) of the Defence (General) Regulations, 1939 (1), and for that he being so lawfully engaged did on the said date unlawfully absent himself without leave from the said ship contrary to reg. 47A (1.) (b) of the regulations (1). On May 19, 1942,

(1) Defence (General) Regulations, 1939, reg. 47A: "(1.) No person lawfully engaged to serve on board any ship to which this regulation applies shall . . . (b) desert or be ab-	" sent without leave from his ship . . . (6.) No person lawfully engaged to serve on board any ship to which this regulation applies shall (a) . . . be whilst on board his ship, in a
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the respondent was lawfully engaged on the *River Afton* as donkeyman and greaser. On May 20, he was discharged from the ship while she was still at Middlesbrough. On May 21, an entry was made in the log setting forth that on May 19 the respondent's watch was from 6 P.M.; that at 9.30 P.M. the lights failed, the fires were nearly out, and steam was down to 50 lbs. instead of 500 lbs., the normal necessary pressure; that the respondent could not be found; that at 10 P.M. he returned to the ship under the influence of drink; and that he had been ashore without permission and had left the boilers and stokehold in a dangerous condition. The entry concluded:

"state of drunkenness so that the
"performance of his duties . . .
"is thereby impeded."

By Merchant Shipping Act, 1894, s. 228: "If any offence, within the meaning of this Act, of desertion or absence without leave or against discipline is committed, or if any act of misconduct is committed for which the offender's agreement imposes a fine and it is intended to enforce the fine, (a) an entry of the offence or act shall be made in the official log-book, and signed by the master and also by the mate or one of the crew; and (b) the offender, if still in the ship, shall before the next subsequent arrival of the ship at any port, or if she is at the time in port before her departure therefrom, either be furnished with a copy of the entry or have the same read over distinctly and audibly to him, and may thereupon make such reply thereto as he thinks fit; and (c) a statement of a copy of the entry having been so furnished, or of the entry having been so read over, and, in either case, the reply (if any) made by the offender, shall likewise be entered and signed in manner aforesaid; and (d) in any subsequent legal pro-

ceeding the entries by this section required shall, if practicable, be produced or proved, and in default of that production or proof the court hearing the case may, in their discretion, refuse to receive evidence of the offence or act of misconduct."

Sect. 239, sub-s. 4: "An entry required by this Act in an official log-book shall be made as soon as possible after the occurrence to which it relates, and if not made on the same day as that occurrence shall be made and dated so as to show the date of the occurrence and of the entry respecting it; . . ."

Sub-s. 6: "Every entry made in an official log-book in manner provided by this Act shall be admissible in evidence."

Sect. 695: "(1.) Where a document is by this Act declared to be admissible in evidence, such document shall, on its production from the proper custody, be admissible in evidence in any court . . . and, subject to all just exceptions, shall be evidence of the matters stated therein in pursuance of this Act or by any officer in pursuance of his duties as such officer."

"I wish this man to be dealt with under the Defence Regulation 47A for absence without leave, drunkenness and neglect of duty." The entry was duly signed. The respondent was not furnished with a copy of the entry, nor was it read over to him. No evidence other than the entry was offered against him. The justices were of opinion that, as it was practicable to comply with the provisions of s. 228 (b) and (c) of the Merchant Shipping Act, 1894, as to the furnishing of a copy of the entry, or the reading it over to the respondent, and as that was not done, the entry was not admissible in evidence. It would have been practicable to comply with the section if the entry had been made as soon as possible after the occurrence (as required by s. 239, sub-s. 4, of the Act) instead of waiting until after the respondent had been discharged. As no other evidence had been tendered the justices dismissed the informations, but stated this case.

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Etherton for the appellant. The Merchant Shipping Act, 1894, has no application because the respondent was charged under reg. 47A of the Defence (General) Regulations, 1939, and s. 228 of the Act only applies to an offence "within the meaning of this Act." In any case the furnishing of a copy of the entry in the log, and the reading it over to the respondent were not conditions precedent to the admissibility in evidence of the entry under s. 239, sub-s. 6, of the Act. It could not be so, because in many cases, as in the present case where the respondent had been discharged before the making of the entry, compliance with the Act would be impossible. [*Patterson v. Robinson* (1) was referred to.]

The respondent did not appear.

CHARLES J. It is clear from s. 239, sub-s. 6, and s. 695, sub-s. 1, of the Merchant Shipping Act, 1894, that an "entry made in an official log-book in manner provided by this Act" is, "subject to all just exceptions," admissible in any court as evidence of the matters stated therein pursuant to the Act. As Avory J. said in *Patterson v. Robinson* (2), "the real intention of the Act was that the entry in the log-book should wherever practicable be admissible as the best evidence." The justices came to the conclusion that s. 228 of the Act applied, that it had not been complied with, and that in consequence the entry in the log-book was not admissible

(1) [1929] 2 K. B. 91.

(2) *Ibid.* 96.

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in evidence, and, there being no other evidence, they dismissed the information. In my opinion, they came to an incorrect decision in point of law, and the case should be sent back to them for their consideration.

TUCKER J. The short point is whether in proceedings under reg. 47A of the Defence (General) Regulations, charging the respondent with desertion from his ship and with drunkenness, an entry in the official log made under the Merchant Shipping Act, 1894, was receivable in evidence, although the provisions laid down in s. 228 of the Act had not been complied with. Admittedly, the entry in the ship's log was not read over to the respondent, nor was he furnished with a copy of it, and it is said that by reason of this non-compliance with s. 228 the entry in the log was not admissible in evidence. On this case as stated, I think that this was an entry made "in an official log-book in manner provided by "this Act" within s. 239, sub-s. 6, of the Act. The making of the entry is in no way connected with the provisions in s. 228 for the furnishing of a copy of the entry, or reading it over, to the offender. The latter may or may not be necessary in proceedings under s. 228, but, in my view, it is not a condition precedent to the admissibility in evidence in the present proceedings of an entry in a log-book otherwise properly made. We are not deciding in this case that an entry in a log-book which has not been made as soon as possible after the occurrence is an entry which has been made "in manner provided by this Act" within s. 239, sub-s. 6, of the Act. If the point had been taken on behalf of the respondent before the justices that the entry in the log-book in the present case had not been made "as soon as possible after the occurrence to which it relates" within s. 239, sub-s. 4, of the Act, and, therefore, was not made "in manner provided by this Act," within s. 239, sub-s. 6, it would have required consideration, but it appears from the case stated that that contention was not advanced. I agree that the case should be remitted to the justices.

Appeal allowed.

Solicitor for appellant: *Treasury Solicitor (War Transport Branch).*

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BUCKMAN v. BUTTON.

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Mar. 25, 26.

Emergency legislation—Offence against Defence Regulations—Penalties increased by later Order in Council—Applicability of increased penalty to offence already complete—Onus of proof—Exception to general provision—Registration under Limitation of Supplies Orders—Defence (General) Regulations, 1939 (St. R. & O., 1939, No. 927), reg. 55—St. R. & O., 1942, No. 501, para. 1 (1D).

The appellant was charged before justices on informations preferred under reg. 55 of the Defence (General) Regulations, 1939, as a person required to register under the Limitation of Supplies (Miscellaneous) Orders, No. 5 of 1940 and No. 11 of 1941, with failing to make application for registration, and with carrying on, after the dates prescribed by the orders for making application, a wholesale business in controlled goods. Between the dates of the alleged offences and the hearing of the informations St. R. & O., 1942, No. 501, came into operation, and increased the penalties which justices had been empowered by reg. 92 of the Defence (General) Regulations, 1939, and by St. R. & O., 1941, No. 1981, to impose. It was contended for the appellant that the onus was on the prosecution to prove that he had not made application for registration, also that the increased penalties under St. R. & O., 1942, No. 501, were not retroactive and did not apply to an offence which was complete when the order came into operation:—

Held, (1.) that it was not necessary for the prosecution to prove a negative, and that, therefore, the onus was on the appellant of proving either that he had made application or was a person exempt from registration; (2.) that the justices had only to consider what were their powers at the time when the informations came before them, and so were entitled to impose the increased penalties on the appellant.

Director of Public Prosecutions v. Lamb [1941] 2 K. B. 89 applied.

CASE stated by justices.

At a court of summary jurisdiction sitting at Aldershot on June 29, 1942, informations were preferred by the respondent, Wilfred Alan Button, acting for the Board of Trade, under reg. 55 of the Defence (General) Regulations, 1939, charging the appellant, David Buckman, with offences under the Limitation of Supplies (Miscellaneous) Orders, No. 5 of 1940 (St. R. & O., 1940, No. 2031) and No. 11 of 1941 (St. R. & O., 1941, No. 700), in failing to make application for registration as required by the said orders, and in carrying on business after the dates (December 15, 1940, and June 15,

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1941) prescribed by the orders for the making of applications for registration.

Between June 5 and 15, 1941, the appellant bought and sold again by wholesale controlled goods of the total estimated value of 663*l.*, and realized a profit therefrom of 141*l.*, and between June 15 and November 30, 1941, he bought and sold again by wholesale further controlled goods of the total estimated value of 1847*l.*, making a profit of 392*l.* The appellant elected neither to give nor to call evidence, but the prosecution called a witness to prove that there was no official record of any application for registration having been made by the appellant.

On March 23, 1942, by Order in Council (St. R. & O., 1942, No. 501) (1), regs. 55 and 92 of the Defence (General) Regulations, 1939, were amended and power given to impose increased penalties.

The justices convicted the appellant and fined him a total sum of 1000*l.*, with the alternative, in default, of imprisonment. They were of the opinion that the decision in *Director of Public Prosecutions v. Lamb* (2) applied, and they, therefore, imposed penalties which they considered to be consistent with those authorized by St. R. & O., 1942, No. 501.

G. O. Slade for appellant. There was no evidence that the appellant was a person liable to be registered under the order, or that he had omitted to make application for registration. The prosecution rely on s. 14 of the Summary Jurisdiction Act, 1848, and s. 39, sub-s. 2, of the Summary Jurisdiction Act, 1879, but, in spite of the provisions of those sections, the onus lies on the prosecution to prove a negative if it is a necessary ingredient of the offence: see *Over v. Harwood* (3); *Woolmington v. Director of Public Prosecutions* (4). When the

(1) By St. R. & O., 1942, No. 501, para. 1 (1B): "Any person guilty of an offence against [reg. 55 of the Defence (General) Regulations, 1939], being a breach of the control or an offence referred to in para. (1B) or (1C) of this regulation, shall be liable—(a) on summary conviction, to a fine not exceeding the maximum amount provided in para. (1E) of this regulation, or to imprisonment

"for a term not exceeding one year, or to both such fine and such imprisonment." [Note. This provision increased the penalties for contravention of the regulation or an order made under it above those prescribed by reg. 92 of the Defence (General) Regulations, 1939, and, later, by St. R. & O., 1941, No. 1981.]

(2) [1941] 2 K. B. 89.

(3) [1900] 1 Q. B. 803, 806.

(4) [1935] A. C. 462.

legislature amended reg. 55 by St. R. & O., 1942, No. 501, it only intended to impose increased penalties for a contravention of the regulations after the date on which the order came into operation, namely, March 23, 1942. The decision in *Director of Public Prosecutions v. Lamb* (1), on which the justices relied, is in reality much in favour of the appellant. Humphreys J. there said (2): "that where a statute alters the rights of persons, or creates fresh liabilities with regard to persons or imposes obligations on persons, it ought not to be held to be retroactive in its operation unless the words are clear, precise and quite free from ambiguity." There is nothing in the language of St. R. & O., 1942, No. 501, to constrain the court to impose penalties which were not in force when the offence was committed: see also *Reg. v. Griffiths* (3); per Lush J. in *Reg. v. Vine* (4); and *Bourke v. Nutt* (5). The old reg. 55 (1B) has impliedly been replaced by the substitution of an entirely new regulation which has no similarity to the old one. It was not a mere amendment of the old regulation.

Lynskey K.C. and *Valentine Holmes* for respondents. Sect. 14 of the Summary Jurisdiction Act, 1848, and s. 39, sub-s. 2, of the Summary Jurisdiction Act, 1879, in terms provide that it shall not be necessary for the prosecution to prove a negative. If the appellant desires to avail himself of the defence that he has applied for registration the onus lies on him to prove that he made the application or that he is not a person who is required to register. The increased penalties which can be imposed under St. R. & O., 1942, No. 501, are retroactive. The courts are loth to give a statute retroactive effect, except in the case of the alteration of procedure, and they only do so when the words of the statute are clear and unambiguous, but this order in its terms is clear and unambiguous and must be construed as having a retroactive effect. The order does not repeal reg. 55. It adds to that regulation certain further provisions and becomes part of the regulation. For the present purpose there is no material difference between St. R. & O., 1942, No. 501, and the Defence (Finance) Regulations, 1939, and this court should follow *Director of Public Prosecutions v. Lamb* (1). [*Ex parte Pratt* (6) and *Bourke v. Nutt* (5), were also referred to.]

Slade in reply.

(1) [1941] 2 K. B. 89.

(2) Ibid. 100.

(3) [1891] 2 Q. B. 145.

(4) (1875) L. R. 10 Q. B. 195, 201.

(5) [1894] 1 Q. B. 725.

(6) (1884) 12 Q. B. D. 334.

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CHARLES J. It has been contended by Mr. Slade that there was no evidence before the justices that the appellant had not made an application to be registered. In considering that contention the attention of the justices must have been directed to the terms of the Summary Jurisdiction Acts of 1848 and 1879. To s. 14 of the Act of 1848 there is the following proviso: "Provided always that if the information "or complaint in any such case shall negative any exemption, "exception, proviso or condition in the statute on which the "same shall be framed, it shall not be necessary for the "prosecutor or complainant in that behalf to prove such "negative, but the defendant may prove the affirmative "thereof in his defence, if he would have the advantage of "the same." Those are very clear words. In s. 39, sub-s. 2, of the Act of 1879 there are to be found almost the same words, with slight elaboration. The sub-section provides: "Any "exception, exemption, proviso, excuse or qualification, "whether it does or does not accompany in the same section "the description of the offence in the Act, order, bylaw, "regulation or other document creating the offence, may be "proved by the defendant, but need not be specified or "negated in the information or complaint, and, if so specified "or negated, no proof in relation to the matter so specified "or negated shall be required on the part of the informant "or complainant." The position, therefore, is that the appellant, being a person who was supplying controlled goods, was required before a prescribed date to make application for registration. Art. 1 (5.) of the Limitation of Supplies (Miscellaneous) (No. 5) Order, 1940, provides: "No person "who is required by this article to make an application to be "registered shall carry on any business referred to in this "article after the prescribed date unless he has made that "application." In my view, it is clearly for the appellant to show that he has made that application or that he has an excuse for not having done so. As indicated in the Summary Jurisdiction Acts, 1848 and 1879, the appellant had a defence open to him, but he called no evidence and so the complaint against him remained uncontradicted. The justices took the proper course in holding that it was not for the respondent to call evidence to prove that the appellant had not made an application. The onus of proving that he had made an application was on the appellant.

The other point taken by Mr. Slade refers to the fact that

by St. R. & O., 1942, No. 501, the penalties for offences such as those with which the appellant was charged were increased over and above those which were in existence at the time of the commission of the offences by the appellant. It is contended that the order, which came into operation on March 23, 1942, can have no application to an offence committed by this appellant in June, 1941. In considering this question it is necessary to see how the order came into operation. The whole matter arose upon reg. 55 of the Defence (General) Regulations, 1939, which, so far as it affects this case, is as follows: "A competent authority, so far as appears to that authority to be necessary in the interests of the defence of the realm or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, may by order provide—(a) for regulating or prohibiting the production, treatment, keeping, storage, movement, transport, distribution, disposal, acquisition, use or consumption of articles of any description, and, in particular, for controlling the prices at which such articles may be sold." The penalties are to be found in reg. 92, and I think the words of that regulation are most illuminating on this question whether St. R. & O., 1942, No. 501, is retroactive or not. They are as follows: "If any person contravenes or fails to comply with any of these regulations, or any order, rule or by-law made under any of these regulations, or any direction given or requirement imposed under any of these regulations or under any order, rule or by-law made under any of these regulations, he shall, save as otherwise expressly provided by or under that regulation, be guilty of an offence against that regulation, and, subject to any special provisions contained in these regulations, a person guilty of an offence against any of these regulations shall—(a) on summary conviction be liable" to the penalties therein set out.

The next regulation which affects this matter is St. R. & O., 1941, No. 1981, dated December 9, 1941, which runs as follows: "Where an order under para. (1.) of this regulation [reg. 55] contains any such provisions as are mentioned in sub-para. (a) of that paragraph and a person is, in respect of any article, convicted of an offence against this regulation consisting of a contravention of any such provision, he shall, subject to the provisions of this paragraph, be liable in addition to the penalties provided for by reg. 92 of these regulations, to a fine or further fine." That increased the

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penalty. The order, St. R. & O., 1942, No. 501, created two new offences, imposed a penalty for those new offences, and increased the penalties for existing offences. It was argued for the appellant that para. 1 (1D) of the order could not be regarded as retroactive because shortly before St. R. & O., 1941, No. 1981, was issued *Director of Public Prosecutions v. Lamb* (1) was decided, in which expressions were used showing that great importance was to be attached to the word "convicted" in considering whether such penalties could be regarded as being retroactive. I think it would be improper to construe St. R. & O., 1942, No. 501, without looking closely at the original penalty regulation, reg. 92. That regulation begins: "If any person contravenes," but para. (1D) in the order of 1942 begins: "Any person guilty of an offence against this "regulation" shall be liable on summary conviction to a fine or imprisonment. It appears to me to be that the word "guilty" must be taken to mean "found guilty." What, then, had the justices to consider. In *Director of Public Prosecutions v. Lamb* (1), Humphreys J. stated with perfect clearness what was the duty of a magistrate in such a case (2): That was a prosecution under the Defence (Finance) Regulations, but that which was said there can equally be applied to the present case. Humphreys J. said: "Those matters "came before the learned magistrate on September 4, 1940: "The informations had been laid on August 17. The offences "were alleged to have been committed between September 3, "1939, that is, the day when these Defence (Finance) Regulations "came into force, and May 11, 1940, that being the date, as "we were told, when in fact disclosure was made by the "defendants. On September 4, 1940, therefore, the magistrate, "looking to see what his powers were in the matter, would "find them contained in reg. 9 of the Defence (Finance) "Regulations. . . . By September 4, 1940, however, the "additional power had been provided by an Order in Council "of June 11, 1940, as an alternative to imposing a fine of 100l., "to impose a fine equal to three times the value of the currency "or whatever it may be which is the subject of the breach of "the regulation. The fine may be whichever sum is the larger. "The law was, therefore, altered at a date considerably before "the laying of the informations and to a greater extent before "the hearing of them" (3). A little later the learned judge

(1) [1941] 2 K. B. 89.

(3) Ibid. 89, 99, 101.

(2) Ibid. 99.

added: "For that reason I take the view that the magistrate "was wrong in considering that that doctrine [as to the retro- "active effect of a statute or order in council] hampered him "in any way in giving effect to the perfectly plain language "of this order in council. It was totally immaterial for him "to consider what would have been his powers if this matter "had come before him six months earlier than it did. He "was sitting on September 4. All that he was concerned "with was what were his powers on September 4. His "powers were clearly stated in the order which had existed "since June 11." In the present case the justices had before them offences committed in June, 1941. Between the commission of the offences and the hearing of the informations on June 29, 1942, St. R. & O., 1942, No. 501, was passed, coming into operation on March 23, 1942. The justices, therefore, had that order before them, and, in my view, they acted correctly in imposing penalties consistent with it. The appeal must be dismissed.

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TUCKER J. I agree. I only desire to add a few words on a minor matter, namely, the first point taken by Mr. Slade, that there was no evidence that the appellant was a person liable to register under the orders. It being found that the appellant was a wholesale dealer in controlled goods, the onus was on him to show that he came within one of the excepted classes of persons in the Limitation of Supplies (Miscellaneous) Orders, and it is for that reason, I think, that Mr. Slade's first argument fails, rather than by reason of the statement made by the appellant which is attached to the case.

Appeal dismissed.

Solicitors for appellant: *Phoenix, Levinson, Walters & Shane.*

Solicitor for respondent: *Solicitor, Board of Trade.*

A. W. G.

1943

Mar. 30, 31.

GREGORY v. CATTLE.

Justices—Case stated—Time for stating case—Case stated under Summary Jurisdiction Act, 1857, and Summary Jurisdiction Act, 1879—Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 2—Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33, sub-s. 2—Summary Jurisdiction Rules, 1915 (St. R. & O., 1915, No. 200/L.12), r. 52.

By s. 2 of the Summary Jurisdiction Act, 1857, no time limit is imposed within which a case must be stated by justices for the opinion of the High Court. By s. 33, sub-s. 2, of the Summary Jurisdiction Act, 1879, a case must be "stated within such time . . . as may be . . . directed by rules under this Act," and by r. 52 of the Summary Jurisdiction Rules, 1915, "the case shall "be stated within three calendar months after the date of the "application" for it.

A case was stated in a usual form under both Acts, some three months outside the time limit imposed by r. 52 :—

Held, by Charles J. and Hallett J. (haesitante), Stable J. dissentiente, that the two Acts must be read together, that s. 33 of the Act of 1879 amended the procedure to be followed in stating a case, and that, consequently, the appellant was out of time and the case could not be heard.

CASES stated by Southport justices.

At a court of summary jurisdiction sitting at Southport on May 2, 1942, four informations were preferred by the respondent, Arnold Cattle, against the appellant, Robert Gregory, charging that the appellant had unlawfully contravened the provisions of the Control of Paper (No. 32) Order, 1941 (St. R. & O., 1941, No. 528). The justices convicted and fined the appellant who duly applied to them to state cases for the opinion of the High Court. On May 26 draft cases were sent by the clerk to the justices to the Treasury Solicitor who was acting for the respondent. Correspondence ensued, and, finally, on October 27, 1942, the cases were stated by the justices. They were in the form (No. 210) given in Stone's Justices Manual, 74th ed. (1942), p. 2273, and each set forth that it was a "Case stated . . . under the Summary Jurisdiction Act, 1857, and "the Summary Jurisdiction Act, 1879." Under s. 2 of the Act of 1857 no limit of time for stating the case is prescribed, but by s. 33, sub-s. 2, of the Act of 1879 : "The application shall be made and the case stated within "such time and in such manner as may be from time to "time directed by rules under this Act, and the case shall

"be heard and determined in manner prescribed by rules of court made in pursuance of the Supreme Court of Judicature Act, 1875, and the Acts amending the same; and subject as aforesaid, [the Act of 1857] shall, so far as it is applicable, apply to any special case stated under this section, as if it were stated under that Act: Provided that nothing in this section shall prejudice the statement of any special case under that Act." By r. 52 of the Summary Jurisdiction Rules, 1915, made under the Act of 1879: "An application to a court of summary jurisdiction under s. 33 of the Summary Jurisdiction Act, 1879, to state a special case shall be made in writing and shall be left with the clerk of the court at any time within seven clear days from the date of the proceedings to be questioned The case shall be stated within three calendar months after the date of the application" If, therefore, r. 52 applied in the present case, the case was stated nearly three months out of time. Accordingly, when the case was called on,

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Valentine Holmes, for the respondent, took the objection that the cases had been stated out of time and could not be heard.

Squibb, for the appellant. The cases were stated under the Act of 1857 as well as under the Act of 1879 and under the Act of 1857 there is no limit of time for stating a case. True, that s. 33, sub-s. 2, of the Act of 1879, does, by reference to rules, impose a time limit, but, by the proviso to that subsection: "nothing in this section shall prejudice the statement of any special case under [the Act of 1857]." The imposition of a time limit obviously "prejudices" the statement of a case, and, therefore, it does not apply to any case stated under the Act of 1857. Sect. 33, sub-s. 2, of the Act of 1879 is an enactment to amend procedure, and, therefore, the effect of the proviso is that the procedure under the Act of 1857 is unaffected so far as a case stated under that Act is concerned. The Act of 1879 is an extending Act, not an Act to cut down the application of the Act of 1857. It is immaterial that the present cases were said to be stated under the Act of 1879 as well as under that of 1857. [The judgment of Channell J. in *Stokes v. Mitcheson* (1) was referred to.]

Valentine Holmes, in reply. The two Acts of 1857 and 1879 are to be read together: per Channell J. in *Stokes v.*

(1) [1902] 1 K. B. 857, 865.

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Mitcheson (1), and, therefore, the procedure under the Act of 1857 is amended in respect of the time for stating cases by the rules made under the Act of 1879. [*Duke of Atholl v. Read* (2) was referred to.]

CHARLES J. In support of his preliminary objection Mr. Holmes referred us to *Stokes v. Mitcheson* (1), where Lord Alverstone C.J. said (3): "It is not disputed that under "that Act"—that is, the Act of 1857—"a person who has "preferred an information is a party to the proceeding and "can apply for a case. Then came s. 33 of the Summary "Jurisdiction Act, 1879, which purports to amend the "procedure." In fact, it does so, and s. 33 which imposes the time limit is in Part II. of the Act, which is headed "Amendment of procedure." Channell J. said (4): "My "opinion is that the powers as to stating a case, contained in "the Acts of 1857 and 1879, are not separate powers, although "there is a slightly different machinery, but that, in substance, "the two Acts are to be read together." On those statements, it appears to me clear that the submission made by Mr. Squibb that he is entitled to separate the two Acts and to say: "I will "disregard the Act of 1879, which imposes a time limit, and "will focus my attention on the Act of 1857 wherein there is "no such limit," cannot be supported. The two Acts must be read together, and that of 1879 effects an alteration in the procedure. Mr. Squibb also relied on the proviso to s. 33, sub-s. 2, of the Act of 1879. The present cases, he said, were stated under the Act of 1857, and, by the proviso, nothing in s. 33 of the Act of 1879 is to prejudice the statement of a case under the Act of 1857. I cannot see how the imposition of a time limit for stating a case prejudices the statement of the case. Such a matter is a mere alteration in procedure, or, as Channell J. said, in "machinery," and it is significant that the Summary Jurisdiction Rules, 1915, were made after the decision in *Stokes v. Mitcheson* (1), but the essential matters relating to the statement of a case, such as, for instance, whether a prosecutor is a "person aggrieved" who can apply for a case to be stated, are not interfered with. For these reasons, I have come to the conclusion that the preliminary point is well-founded and we have no jurisdiction to hear these appeals.

(1) [1902] 1 K. B. 857.

(2) [1934] 2 K. B. 92.

(3) [1902] 1 K. B. 857, 862.

(4) Ibid. 865.

STABLE J. I regret that I am unable to come to the same conclusion. It would be a sufficient basis for the opinion I have formed to say that I have found nothing in the Summary Jurisdiction Act, 1879, which affects the right to have a case stated conferred by the Act of 1857 or the machinery by which that right can be exercised. Under the Act of 1857 a party who was dissatisfied with the determination of a matter by justices might apply in writing "within three days" after the determination to the justices to have a case stated for the opinion of the High Court, no time limit being imposed within which the case had to be stated. If that Act stood alone, there is no doubt that the appellant would have the right to have the present appeal heard and determined by this court, but s. 33, sub-s. 2, of the Summary Jurisdiction Act, 1879, provides that a case shall be "stated within such time . . . as may be . . . directed by rules," and by r. 52 of the Summary Jurisdiction Rules, 1915, a case "shall be stated within three calendar months after the date of the application." It is clear that under the sub-section the provisions of the Act of 1857 are to apply to a case stated under the Act of 1879, subject to any amendment in procedure made by the Act of 1879 and the rules made under it. Rule 52 in terms deals with cases stated under s. 33, sub-s. 1, of the Act of 1879, and, in my view, only with those cases. No mention is made of the Act of 1857. It is not suggested that the extension by r. 52 to seven days of the time limit for applying for a case to be stated affects an application under the Act of 1857. The time limit under that Act remains three days. Moreover, by the proviso to sub-s. 2 of s. 33 of the Act of 1879: "Nothing in this section shall prejudice the statement of any special case under [the Act of 1857]." If the view that s. 33, sub-s. 2, is designed to amend procedure is correct, what does the proviso mean except that the procedure under the 1857 Act shall be left intact? I am fortified in this conclusion by the passage in the judgment of Channell J. in *Stokes v. Mitcheson* (1): "My opinion is that the powers as to stating a case, contained in the Acts of 1857 and 1879, are not separate powers, although there is a slightly different machinery, but that, in substance, the two Acts are to be read together." The point which the court had to decide in that case was whether an unsuccessful prosecutor in the court below was a "person aggrieved" within s. 33, sub-s. 1, of the Act of 1879, or

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whether he came within the rather wider words in the Act of 1857, and the court in substance held that it did not matter whether he was a "person aggrieved" or not because, if he was outside those words, he fell within the Act of 1857. Channell J. said (1): "although there is a slightly different "machinery." What is machinery but procedure? The time within which a case must be stated is, in my view, procedure, and it is that procedure under the Act of 1857, among other things, which is safeguarded by the proviso to s. 33. In my judgment, therefore, the point that the court has no jurisdiction to hear these cases stated on the ground that they were not stated within the three months fails.

HALLETT J. I have had great difficulty in making up my mind about the validity of the preliminary objection and I am still far from certain that I have arrived at the correct conclusion. The applications for these cases and the cases were both in the common form and purported respectively to be made and to be stated both under the Act of 1857 and under that of 1879. In so far as the cases were stated under the Act of 1879, a difficulty clearly presents itself because they were not stated within three months, as required by r. 52 of the Summary Jurisdiction Rules, 1915, but Mr. Squibb says that he is entitled to ignore the fact that the cases were stated under the Act of 1879 and can treat the matter as though they had been stated solely under s. 2 of the Act of 1857. It would seem that the real question is whether Mr. Squibb can separate each case in that way so as to say, in effect, that he made two applications and obtained two cases of which one case cannot be heard because it was stated out of time, but the other case can be heard because no limit as to time for stating it was imposed by the Act of 1857.

In deciding that question I find little help in the authorities. In *Duke of Atholl v. Read* (2), to which Mr. Valentine Holmes referred us, a preliminary objection was taken as it has been here. By s. 2 of the Summary Jurisdiction Act, 1857, it is required that notice in writing of the appeal, with a copy of the case stated, shall be sent by the appellant to the other party to the proceeding before the case is transmitted to the court. By an error, that requirement had not been fulfilled, and objection was taken to the jurisdiction of the court to hear the case. Mr. Holmes asks why, in those circumstances,

(1) [1902] 1 K. B. 857, 865.

(2) [1934] 2 K. B. 92.

counsel who appeared for the appellant did not fall back on the Act of 1879 just as Mr. Squibb here desires to fall back on the Act of 1857. Having regard to the names of the counsel in that case and the composition of the court, it would, indeed, have been remarkable if a point which was there open to the appellant had been overlooked by all those concerned, but, in truth, I do not think that there is anything in the point because consideration of s. 33 of the Act of 1879 shows that the requirement of s. 2 of the Act of 1857 which had not been complied with by the appellant in *Duke of Atholl v. Read* (1) applies equally where a case is stated under s. 33 of the Act of 1879, and, therefore, it would have been useless for the appellant in that case to rely on the Act of 1879. Accordingly, that case and the failure of counsel therein to take a point similar to that taken by Mr. Squibb, does not help me. In *Stokes v. Mitcheson* (2), again, I do not find as much assistance as do the other members of the court. The case there purported to be stated only under s. 33 of the Summary Jurisdiction Act, 1879, which gives a right to apply for a case, to a "person aggrieved," and the point was taken on behalf of the respondent that the appellant was not a "person aggrieved," and that, therefore, he could not apply for a case under that section. In those circumstances, the appellant desired to avail himself of s. 2 of the Act of 1857, because by that section a right to apply for a case to be stated is given to either party to the proceeding and it could not be doubted that the appellant was a party to the proceeding. The court decided that, although the case purported to be stated under s. 33 of the Act of 1879, and although it was, at least, doubtful whether the appellant was a person entitled to apply for a case under that section, the two Acts must be read together, and so the appellant could fall back on s. 2 of the Act of 1857 to establish his right to apply for a case. Accordingly the decision is not one which governs us in this case, but, none the less, I agree that some assistance can be derived from what was said in the judgments of Lord Alverstone C.J. and Channell J.

The difficulty to my mind, as has been stated in more detail by my brother Stable, arises from the existence of the proviso to s. 33, sub-s. 2, of the Act of 1879. Furthermore, I am troubled by the fact that r. 52 of the Summary Jurisdiction Rules, 1915, in its terms appears to deal only with an application

(1) [1934] 2 K. B. 92.

(2) [1902] 1 K. B. 857.

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to a court of summary jurisdiction under s. 33 of the Act of 1879. If that rule purported to deal with a case stated under either Act, then, subject to the question whether such a rule would be ultra vires having regard to the terms of s. 33 of the Act of 1879, I should feel no difficulty. As it is, I have been attracted by the argument that the provision directing a case to be stated within three months after the date of the application does not affect, or if it does affect prejudices, the statement of a special case under s. 2 of the Act of 1857 which contains no limitation of time. However, in the end, having regard to the matters which have been referred to by Charles J., I have come to the conclusion that the preliminary objection should succeed. The crucial matter in bringing me to that conclusion is that s. 33 of the Act of 1879 is contained in Part II. of that Act which is headed: "Amendment of Procedure," and, indeed, apart from any heading, it would appear to be in a portion of the Act which reviews and amends certain of the procedure of courts of summary jurisdiction. There is ample warrant for the statement by Lord Alverstone C.J. in *Stokes v. Mitcheson* (1) that s. 33 of the Act of 1879, among other sections, purported to amend the procedure. Furthermore, looking at the provisions as a whole, I think that Channell J. was right in saying that "the powers as to stating a case, contained in the Acts of 1857 and 1879, are not separate powers, . . . but in substance, the two Acts are to be read together." (2). What would have been the position if the justices here had purported only to state cases under s. 2 of the Act of 1857 it is not necessary to decide. The fact is that the cases were stated, as the appellant asked that they should be, under both Acts, and I do not think it is open to the appellant, now that difficulties occur in connexion with the provisions of one of the Acts, to throw that Act overboard and to rely solely on the other. Accordingly, I agree with the result of the first judgment which has been delivered, although I regret that I have not been able to arrive at my conclusion with the same clarity and certainty.

Appeals struck out.

Solicitors for appellant: *Pritchard, Englefield & Co., for Brighouse, Jones & Co., Southport.*

Solicitor for respondent: *Treasury Solicitor.*

(1) [1902] 1 K. B. 857, 862.

(2) Ibid. 865.

W. L. L. B.

COLLINS ARDEN PRODUCTS, LIMITED v. BARKING
CORPORATION AND ANOTHER.

1943
Apr. 2.

*Food and drugs—Article not of nature, substance or quality demanded—
Label calculated to mislead—Prejudice of purchaser—Evidence—
Character of article as understood by ordinary purchaser—"Cordial"
—Meaning—Food and Drugs Act, 1938 (1 & 2 Geo. 6, c. 56), s. 3,
sub-s. 1; s. 6, sub-s. 1.*

Where a person is charged under s. 3, sub-s. 1, of the Food and Drugs Act, 1938, with selling "to the prejudice of the purchaser" any food which is not of the nature, substance or quality of the food demanded, it is not sufficient, to justify a conviction, that an expert witness, such as a public analyst, should express the opinion that the article in question should contain a certain ingredient. Evidence must be forthcoming that when a member of the general public asks for the food he means, and means only, an article containing an ingredient which is absent in the food in respect of which the charge is brought.

CASE stated by Essex justices.

At a court of summary jurisdiction sitting at Stratford, Essex, on September 9, 1942, informations were preferred by the respondents, the corporation of Barking, and Norman Bastable, chief sanitary inspector of the borough, charging the appellants, Collins Arden Products, Ltd., with an offence under s. 3, sub-s. 1, of the Food and Drugs Act, 1938 (1), in selling to the prejudice of the purchaser a food which was not of the nature, substance or quality of the food demanded by the purchaser, and also with an offence under s. 6, sub-s. 1, of the Act in giving to the purchaser a label calculated to mislead as to the nature, substance or quality of the food.

The appellants were the manufacturers and bottlers of a beverage described on the label attached to the container as "Orange-Citric Flavoured Cordial." It was non-alcoholic

(1) By Food and Drugs Act, 1938, s. 3, sub-s. 1: "If any person sells to the prejudice of the purchaser any food or drug which is not of the nature, or not of the substance, or not of the quality, of the food or drug demanded by the purchaser, he shall . . . be guilty of an offence."

Sect. 6, sub-s. 1: "A person who gives with any food or drug

"sold by him a label . . . which
"falsely describes that food or
"drug, or is otherwise calculated
"to mislead as to its nature,
"substance or quality, shall be
"guilty of an offence, unless he
"proves that he did not know,
"and could not with reasonable
"diligence have ascertained, that
"the label was of such a character
"as aforesaid."

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and contained no sugar, but it was sweetened with saccharin. Before putting the preparation on the market the appellants had submitted samples of the beverage and copies of the label to the public analyst of the city of Westminster and the boroughs of Kensington and Hammersmith, within whose district their head office was situated, and he had approved them. The public analyst for the borough of Barking, Dr. Hamence, certified that the beverage "consisted of a "solution of citric acid, flavoured with orange oil, coloured "with a dye and sweetened with saccharin," and he gave evidence that the word "cordial," in its origin, was used to denote an alcoholic liquid having a heartening or restorative action, but that for many years the word had been used to denote a flavoured syrup having a physiological effect which might be described as heartening due to the presence of a large proportion of sugar. In his opinion, the liquid in question, having no sugar or alcohol to give it a heartening effect, could not be described as a cordial. For the appellants the public analyst of Westminster and two consulting analysts were called. They disagreed with the opinion of the Barking analyst and defined a cordial as "any pleasant beverage, "sweetened or unsweetened, flavoured, and needing dilution."

A majority of the justices were of opinion that "the preparation was a palatable and harmless beverage, but that in the "absence of any ingredient of a tonic, invigorating, restorative, "energizing or warming quality, the term 'cordial' was a "misdescription." They, therefore, held that the preparation was sold to the prejudice of the purchaser, and that the label was misleading, and they fined the appellant 20*l.* on each information. In this case stated by them they submitted the following question for the opinion of the High Court: "Whether we came to a correct determination in holding "that offences had been committed under both s. 3 and s. 6, "sub-s. 1, of the Food and Drugs Act, 1938, by reason only "of the fact that the liquid in question contained no sugar or "alcohol."

Valentine Holmes and *R. E. L. Parry* for the appellants. The justices made three fundamental mistakes. They omitted to apply the proper test, which was whether or not the preparation in question was what the public and trade generally understood as a cordial; they regarded the commodity as static for all time, whereas it is common knowledge that since the outbreak

of war many commodities have changed very largely in their ingredients, although quite properly still sold under the same name; and they treated the matter as one of expert opinion. The opinion of the Barking analyst is irrelevant. No evidence was called by the prosecution to prove that when the purchaser demanded a cordial he meant, and could only mean, a syrup containing sugar or alcohol, nor was there any evidence to show that the appellants had failed to use reasonable diligence to ascertain whether the label was misleading.

Denning K.C. and *Percy Lamb* for respondents. The question to be decided was one of fact for the justices who were entitled to act on their own knowledge. The connotation of "cordial" is not a question of law. The statute is intended to protect children and housewives, and persons putting a new preparation on the market have a duty to see that purchasers do not accept it as having the ingredients and qualities of an older preparation of the same name: see *Havana Cigar and Tobacco Factories, Ltd. v. Oddenino* (1). The sole question is whether the purchaser is likely to be misled, and when it is found that the original meaning of "cordial" was "an alcoholic liquid having a heartening or restorative action," can it be doubted that the sale of the preparation in question was calculated to mislead many people?

CHARLES J. This case was exceptional in many circumstances. The appellants obviously wished to do all that was proper and in accordance with the law, so, before they put this preparation, described as Orange-Citric Flavoured Cordial, on the market, they asked the public analyst of the borough in which their offices were situated to analyse the product and see whether the label correctly described it. That analyst examined the sample submitted to him, and he came to the conclusion that the label correctly described the product, and that the appellants could safely and properly put it on the market under that label. At the hearing before the justices, who differed in their conclusions, two of them being for a conviction and one against, a strange course was taken. It is not unusual to call a public analyst in cases of this sort. By s. 81, sub-s. 1, of the Food and Drugs Act, 1938, his certificate is sufficient evidence of the facts stated therein, unless the accused person requires that he shall be called as a witness. In the present case the appellants did require the public

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analyst of Barking to be called as a witness and the justices appear to have acted on his evidence. How they could do so I am unable to understand. The analyst began his evidence with a little history, he continued it by some vague statements as to the effect of alcohol and sugar, and he concluded with the opinion that "non-alcoholic cordials should contain a "substantial quantity of sugar." He did not state how much. What does his opinion, as found and treated as facts by the justices, amount to? The case states: "It was proved by "Dr. Hamence that the word 'cordial,' in its origin, was used "to denote an alcoholic liquid having a heartening or restorative "action, but for many years the word had been used to denote "a flavoured syrup having a physiological effect which might "be described as heartening, due to the presence of a large "proportion of sugar." That is strange evidence to act on in a criminal information. The case goes on to state that Dr. Hamence "proved that the drink before the court consisted "of a coloured flavoured solution of citric acid, containing "95.5 per cent. of water, and sweetened with saccharin. "The liquid contained no sugar or alcohol to give it a heartening "effect, and, therefore, could not properly be described as a "cordial. Moreover, the liquid had no food value. Non-"alcoholic cordials, in his opinion, should contain a substantial "quantity of sugar." A distinguished analyst, the public analyst for Westminster, Kensington and Hammersmith, and two consulting analysts, were called for the defence and totally disagreed with Dr. Hamence's vague and indeterminate conclusion, yet on that vague and indeterminate conclusion the justices have propounded for our decision the following question: "Whether we [the justices] came to a correct "determination in holding that offences had been committed "under both s. 3 and s. 6, sub-s. 1, of the Food and Drugs Act, "1938, by reason only of the fact that the liquid in question "contained no sugar or alcohol."

My answer to that question is, unhesitatingly, that the justices came to an incorrect determination. They did not address themselves to the proper question to be considered, namely, whether, when a purchaser asked for a cordial he meant, and meant only, a liquid containing alcohol or sugar. In cases of this sort indeterminate evidence is not sufficient to justify a conviction. If Dr. Hamence had said that, in his opinion, non-alcoholic cordials *must* contain a substantial quantity of sugar or they were not cordials, the position might

be different—I do not express an opinion one way or another—but he said nothing of the sort. He simply said that in his opinion they *should* contain sugar. Other people are of opinion that they need not. In my opinion, there was no evidence on which the justices could come to the conclusion that the appellants had been guilty of the offences charged against them, and the appeal must be allowed, with costs.

STABLE J. I agree. To support the finding of the justices there should have been evidence before them that the word “cordial” meant a liquid containing alcohol or sugar and nothing else. It is insufficient to adduce evidence that the word “cordial” comprises liquids containing alcohol and non-alcoholic liquids containing sugar. It was essential, in my view, as a matter of law, in order to support the conclusion of fact at which the justices arrived, to adduce some evidence that those were the only meanings that the word “cordial” could bear. Dr. Hamence, after a description of the historical origin of the word “cordial,” went on to say that “for many years the word had been used to denote a flavoured syrup having a physiological effect which might be described as heartening, “due to the presence of a large proportion of sugar.” That statement may be perfectly true, but what Dr. Hamence did not say was that those were the only meanings which could properly be attributed to the word “cordial.” It may be that he does entertain the opinion, as he has said, that non-alcoholic cordials should contain a substantial quantity of sugar—other people may entertain all kinds of opinions as to what it is desirable that non-alcoholic cordials should contain—but that is not evidence that, when the ordinary person goes into a shop and asks for a cordial, the only thing he means is either a liquid containing alcohol or a liquid containing a substantial quantity of sugar. In my view, this appeal succeeds.

HALLETT J. I agree. If it appeared from the case that the justices had directed their minds to the right question, and, so directing their minds, had found facts which justified their determination, I should not have thought it right that this court should interfere, but, having perused the case, I am not satisfied on either of those points. Under s. 6, sub-s. 1, a person commits an offence who sells food with a label which is calculated to mislead “unless he proves that he did not

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"know, and could not with reasonable diligence have ascertained, that the label was of such a character as aforesaid;" that is to say, that it was misleading. It is plain that the appellants relied on the defence that, even if they had sold this preparation with a misleading label, they did not know, and could not with reasonable diligence have ascertained, that the label was misleading. They adduced evidence of a formidable character in support of that defence, yet one finds that the justices never addressed their minds to that defence. There is no determination on it and no reference to it in the case. As regards the charge under s. 6, sub-s. 1, I am far from satisfied either that they directed their minds to the proper question or that there are any facts found by them to justify a conviction.

The question whether the conviction under s. 3, sub-s. 1, should be upheld is a more important point. That section renders it an offence: "If a person sells to the prejudice of the purchaser any food or drug which is not of the nature, or not of the substance, or not of the quality, of the food or drug demanded by the purchaser." It is the demand by the purchaser which, to my mind, is the determining factor in deciding what ought to have been supplied. Looking at the case, it seems to me that the justices did not direct their minds to that question, nor did they find the facts to justify their determination, if it be a determination, that what was sold was not of the nature, substance or quality demanded by the purchaser. I wish to refer to one or two sentences in *Morton v. Green* (1), a decision of the Court of Justiciary, which express better than I can what I feel about this matter. That case dealt with the sale of cream, and the prosecution was brought under s. 5 of the Sale of Food and Drugs Act, 1875, which corresponds, so far as is material, with s. 3 of the Act of 1938. Lord Young, who presided, said: "I cannot hold that there are here facts found proved to justify the conclusion that was arrived at. The sheriff has told us what the facts are which he has found proved, and the inference that he has made from these facts, namely, that but for the circumstance that the purchaser was here a sanitary officer he would have been prejudiced. I cannot hold that this inference which the sheriff made upon the question of prejudice is a question of fact. I think it is a question that we are entitled to deal with, and to say whether on the facts

"which the sheriff has stated there was such prejudice in the sale made as warranted a conviction. I am of opinion that these facts did not justify the inference of prejudice, or warrant the conviction. I adhere to what I said in the case of *Davidson v. M'Leod* I am of opinion that upon a right view of the law applicable to the facts, which are as I have stated, the conclusion that the purchaser—but for the circumstance that he happened to be a sanitary inspector—was prejudiced was not justified and that therefore the conviction cannot be sustained." I adopt that language as my own. In his judgment, the Lord Justice-Clerk said: "The vendor, believing that this was what he wanted, gave it to him, and I see nothing to satisfy me that he [the purchaser] expected the vendor to construe his demand in any other sense. I cannot approve of this proceeding. It is too like a catch. The 'article demanded' must be held to be the article meant by an ordinary purchaser to be obtained—not in any scientific definition. . . . I think, looking to the aspect of this case, that it seems a rather obtrusive interference with what, as far as I can see, is an honest trade." Again, I desire to adopt those words as my own in this judgment.

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Appeal allowed.

Solicitors for appellants: *Lieberman, Leigh & Co.*

Solicitors for respondents: *Lees & Co., for Town Clerk, Barking.*

A. W. G.

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Contract—Sale of shares—Valuation—Provision as to method of valuation—Statement by valuer's firm that valuation completed—Valuer's fees paid and valuation delivered—Warranty that prescribed method adopted—No allegation of bad faith against valuer—Action for damages for under-valuation—Competency.

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Parties to a contract for the sale of shares agreed that the shares be valued by the defendant according to a method prescribed by the contract. On July 27, 1942, the defendant's firm wrote to the solicitors of one of the parties stating that the defendant's valuation would be available for posting on July 31, 1942, subject

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to the receipt by him of his costs. These were paid and a report dated July 31, 1942, was received fixing the price of the shares :—

Held, that neither the letter of July 31, nor that of July 27 created a contract in which could be implied a warranty by the defendant that, in valuing the shares, he had followed the method prescribed in the contract.

A person brought in by the parties to a contract to fix a term in the contract on which they cannot agree is not liable to be sued for damages in the absence of bad faith. He is in the position of a quasi-arbitrator, and has the same protection in this respect as that enjoyed by an arbitrator.

Pappa v. Rose (1871) L. R. 7 C. P. 32, 525; *Tharsis Sulphur Co. v. Loftus* (1872) L. R. 8 C. P. 1; and *Stevenson v. Watson* (1879) 4 C. P. D. 148 applied; and *Boynton v. Richardson's* [1924] W. N. 262 followed.

APPEAL from Asquith J.

By an agreement, dated August 19, 1941, and made between the plaintiff and one Michael Joseph Gleeson, the plaintiff agreed to sell his shares in M. J. Gleeson, Ltd., to Michael Joseph Gleeson, the shares to be valued by the defendant, a partner in a firm of chartered accountants, his decision to be final and binding on the parties to the agreement. The agreement contained several clauses laying down the method to be applied in arriving at the value of the shares and a provision that the costs and expenses of the defendant were to be paid by the parties to the agreement in equal shares. On August 21, 1941, a firm of solicitors sent a copy of the agreement to the defendant with a written request on behalf of both parties to the agreement that he would make a valuation of the plaintiff's shares in accordance with the terms of the agreement. On July 27, 1942, the defendant's firm wrote to the plaintiff's solicitors informing them that the defendant's award would be available for posting on July 31, 1942, subject to the receipt by the defendant of his costs and expenses, including disbursements by the defendant in connexion with consultations with chartered surveyors, barristers and professional colleagues, amounting to 512*l.* 10*s.* This amount was duly paid and a report dated July 31, 1942, was received fixing the price of the shares at 15,691*l.* 2*s.* 1*d.* On November 24, 1942, the plaintiff began these proceedings against the defendant claiming by his writ the return of 256*l.* 5*s.*, money had and received by the defendant to the use of the plaintiff on a consideration that had wholly failed and damages for breach of warranty. By his statement of claim, as

originally drafted, the plaintiff claimed that by the letter dated July 31, 1942, written by the defendant to the plaintiff, the defendant purported to report, and thereby represented and warranted that he had valued the plaintiff's shares in accordance with the instructions set out in the agreement. This was the alleged warranty until, by an amendment dated February 17, 1943, it was alleged that by the letter of July 27, 1942, written by the defendant's firm to the plaintiff's solicitors, the defendant "warranted and agreed that upon and in consideration of the payment to him of the said charge, he would on or after July 31, 1942, furnish to the said respective parties (and, in particular, to the plaintiff) a valuation of the said shares made in accordance with the instructions set out in the agreement, and that in arriving at that valuation he had made the disbursements and each of them mentioned in the letter written as aforesaid on or about July 27, 1942, and had incurred liability in respect of such disbursements." It was further alleged (para. 7) that the defendant had not valued the plaintiff's shares in accordance with the instruction in the agreement and had not incurred the alleged or any costs and expenses in connexion with the consultations mentioned in the same letter, and accordingly, that the consideration for the payment of 256*l.* 5*s.* wholly failed, and (para. 8) that the facts alleged in para. 7 amounted to a breach of the warranty given by the defendant. The plaintiff, therefore, claimed, under para. 7, 256*l.* 5*s.*, and, under para. 8, damages. In his particulars of damage he stated that the true valuation should have been about 40,000*l.* and said: "The plaintiff being bound under the agreement to accept the defendant's valuation, has lost the difference between the said valuation and a correct valuation of the said shares." On January 20, 1943, the defendant took out a summons for an order that the plaintiff's statement of claim should be struck out under R. S. C., Or. xxv., r. 4, as disclosing no reasonable cause of action and for the plaintiff's action to be dismissed. Master Baker dismissed the summons and on February 16, 1943, Asquith J. affirmed the master's decision. The defendant appealed.

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Denning K.C. and *Harold Brown* for the defendant. The statement of claim, whether regarded as it was when before Asquith J. or as amended, shows no cause of action and it should be struck out. [LORD GREENE M.R. Para. 7 of the

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statement of claim seems to set up a case of gross fraud with no particulars given.] [*Raeburn* for the plaintiff. There was no such intention.] An action is not maintainable against the defendant in respect of an honest mistake in his valuation, in making which he was in the position of a quasi-arbitrator : *Pappa v. Rose* (1) ; *Tharsis Sulphur Co. v. Loftus* (2) ; *Stevenson v. Watson* (3). These cases were reviewed in *Chambers v. Goldthorpe* (4), when it was said that no action would lie against a person in the position of an arbitrator or quasi-arbitrator in respect of his award except for fraud or collusion. Mere want of care or skill will not avail : *Boynton v. Richardson's* (5). The plaintiff seeks to get over the fact that mere want of care and skill will not give a right of action by alleging a breach of warranty. Both on the original and the amended pleading the letters relied on merely announce that the valuation is ready, but warranty is a matter of contract and it is fantastic to say that either of the letters contains a warranty. The only other claim is for repayment of the sum paid by the plaintiff to the defendant as the plaintiff's share of the defendant's costs and charges. So far as that claim is based on warranty, it obviously fails, and it cannot be maintained that all consideration failed seeing that the plaintiff in the pleadings accepted the valuation as binding on him.

Raeburn for the plaintiff. The position of a valuer has no resemblance to that of an arbitrator : *In re Carus-Wilson and Greene* (6) ; *In re Hopper* (7). In any case, a valuer can be attacked for not carrying out his instructions. Failure to do so causes the contract wholly to fail. The consideration for the payment of 25*l.* 5*s.* has, therefore, wholly failed. Again, on the issue of breach of warranty, it must be remembered that the defendant was employed, not to make a valuation at large by the exercise of his care and skill, but to value in accordance with a specified formula. When, therefore, his firm wrote to say that the valuation was ready, he must be taken impliedly to say that he had made a valuation in accordance with the formula. That alone had been asked for or agreed to be paid for. While, admittedly, an action will not lie for want of care and skill in making the valuation, it

(1) (1871) L. R. 7 C.P. 32, 525.

(2) (1872) L. R. 8 C. P. 1.

(3) (1879) 4 C. P. D. 148.

(4) [1901] 1 Q. B. 624.

(5) [1924] W. N. 262.

(6) (1886) 18 Q. B. D. 7.

(7) (1867) L. R. 2 Q. B. 367.

will lie for a breach of the contract to value according to the formula. By writing to say the valuation is ready, the defendant warranted that he had made it in accordance with his instructions. [GODDARD L.J. A warranty is contractual.] If a man contracts to do a piece of work in a special manner and fails to do it, although paid for it, he has committed a breach of contract, and, if he cannot be sued for the breach, the person injured is left without a remedy. [LORD GREENE M.R. The plaintiff is not suing for breach of the contract of employment.] Until the defendant wrote and said he had completed the valuation he had entered into no contract. He had been offered the work of valuation, but he never accepted it until then. Further, the defendant was not employed in a judicial character, and authorities such as *Chambers v. Goldthorpe* (1) have no application: see *Wisbech Rural Council v. Ward* (2), where that case was commented on by Atkin L.J. If there is no warranty on the pleadings as they stand, the plaintiff would ask to amend by relying on the agreement, under which the defendant was employed as valuer as containing an implied warranty by the defendant. A valuer can be sued for breach of contract even if he cannot be sued for negligence.

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LORD GREENE M.R. The plaintiff's claim falls into two parts. The principal branch is for damages for breach of warranty, the damage alleged to have been suffered being the difference between the defendant's valuation and a correct valuation. The other branch relates to the plaintiff's moiety of the fees claimed by the defendant.

The first claim is based on the allegation that the plaintiff was bound under the purchase agreement to accept the defendant's valuation. In other words, he asserts as the very foundation of his claim that, as between himself and the purchaser of the shares, the price payable had been fixed in accordance with the contract and that he, the vendor, is bound to accept that price. If that were not so, the damage alleged in respect of the suggested breach of warranty would not have been suffered. The cause of action is not laid as a breach of the original contract under which the defendant, at the request of both parties and for the remuneration provided for, agreed to undertake the task of valuation. Mr. Raeburn, in his argument, said that there never was any

(1) [1901] 1 Q. B. 624.

(2) [1928] 2 K. B. 1, 23.

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such contract and the present defendant only became a contracting party when he notified that his valuation was ready to be taken up. That is a very remarkable proposition, but let me for the moment assume that it accords with the pleading. The pleading as originally settled alleges that by his letter of July 31, 1942, to the plaintiff's solicitors the defendant warranted that he had valued the shares in accordance with the instructions set out in the agreement, and it is for breach of that warranty that damages are claimed. That letter, on the face of it, merely reported that the defendant had valued the shares in accordance with the instructions.

Warranty is one of the most ill-used expressions in the legal dictionary, but in its essence it is contractual in nature and must be pleaded in terms sufficient to assert that contractual relationship. How a statement in a letter that a valuer has accomplished his task can support an allegation that by that letter a contract came into existence I cannot understand. The document is completely inconsistent with the conception of any contractual intent in writing it. This is one of those cases where the word "warranty" has been used, as it so frequently is, to try to manufacture a cause of action by calling something a warranty which on its face is clearly not contractual. Warranty is something collateral or incidental to some contract, but in this case there is no contract alleged to which it is incidental or collateral. According to Mr. Raeburn, the only contract made between the parties was that the defendant had valued the shares in accordance with his instructions. That seems to me to be quite fantastic.

The fundamental difficulty about the whole of the plaintiff's case lies in the circumstance that he is seeking to recover damages from a valuer who was employed to fix a price inter partes, by the use of his skill and knowledge, for not having made his valuation in the way contemplated by his instructions. There is no charge of bad faith. We have, therefore, to deal with the matter on the footing that the defendant, while honestly intending to carry out his instructions, has made an honest mistake which may have consisted in misunderstanding his instructions or in inadvertently failing to comply with some element in them. Can such an action be maintained? In my opinion it cannot, and this attempt to create a liability on an alleged warranty is really one to evade the well established rule that a person

in the position of this defendant cannot be made liable for the sort of thing with which he is charged here. On any aspect the substance of the claim against the defendant is that he did not value in accordance with his instructions, but made some honest mistake or oversight for which he must pay the penalty.

We have been referred by Mr. Raeburn to authorities which draw the well known distinction for certain purposes between a valuer and an arbitrator. It is, of course, well known that, if an expert is employed to conduct a valuation, what he does is not an arbitration within the meaning of the Arbitration Act, but that does not touch the present question whether a person who is brought in by agreement between the parties to fix a term in their contract on which they cannot agree is liable, in the absence of bad faith, to be sued for damages. There are a number of decisions which, in my opinion, make it clear that he cannot. The earliest is *Pappa v. Rose* (1), where the defendant, as broker, made for the plaintiff a contract for the sale of "500 tons Black Smyrna raisins, "fair average quality in opinion of selling broker." The defendant was thus brought in to determine on behalf of the parties whether or not the raisins being sold complied with the description of "fair average quality." No suggestion was made that he had not acted bona fide and the action against him was based on the proposition that he had made a mistake in assessing the quality of the raisins. Bovill C.J. said (2): "Upon the other question, namely, whether an action can "be maintained against the broker, who is admitted to have "acted bona fide, I see no reason to dissent from the conclusion "arrived at by my learned brothers. The selling broker "was the person selected by both buyer and seller to determine "whether or not the raisins tendered were of fair average "quality. It by no means follows that, when two persons "submit a matter in difference to the arbitrament of a third, "they agree to take a person of the greatest amount of skill "or intelligence. No matter what may be the degree of skill "he possesses, the decision of the person selected is final and "conclusive; and he is not liable to an action if he makes a "mistake. Here, it is want of skill only that is suggested. "The defendant was in the nature of an arbitrator chosen by "the parties, whose decision is final. Upon general principles, "no action lies against him." It is true that in that case the

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(1) L. R. 7 C. P. 32.

(2) Ibid. 42.

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 1943 quality, and in coming to a decision he was, no doubt, fore-
 FINNEGAN installing possible disputes between the parties, and it may
 v. well be, therefore, that he was in some respects technically in
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 Lord Greene ruling of the Chief Justice, said (1): "The ruling upon
 M.R. "that was, not that the defendant was in the strict sense of
 "the term an arbitrator, but that he was a person filling a
 "position which brought him within an exception well known
 "to the law of England, namely, that a person who is
 "appointed and is acting as an arbitrator to determine a matter
 "in difference between two or more persons does not enter
 "into an implied promise to bring to the performance of the
 "duty intrusted to him a due and reasonable amount of skill
 "and knowledge. The question is merely one of implied
 "undertaking; and the law says there is none such. Was,
 "then, the defendant within that exception? I apprehend
 "that every person falls within it who has taken upon himself
 "to determine a disputed matter between two persons who have
 "agreed to be concluded by his opinion." In one sense
 it is true to say that the fixation of a price in a contract is not
 deciding a matter of dispute, but I cannot see the difference
 between fixing a price on which the parties are unable to agree
 and determining some issue which has arisen or may arise
 between them. That case went to the Court of Exchequer
 Chamber (2) and there Blackburn J. states the principle
 more widely (3): "I do not stop to inquire whether the
 "defendant stood in the position of an arbitrator or not.
 "But he was bound to exercise his judgment impartially
 "between the two contracting parties. The question is:
 "how far he is liable if he has given an erroneous opinion.
 "The court below seem to have thought that the defendant
 "might have been liable for a breach of duty, or a breach of
 "contract, if he had altogether declined to examine the
 "raisins, but that, provided he acted honestly, he was not
 "responsible for an error in judgment. I think it would be
 "extremely dangerous to hold that either party could bring
 "an action under such circumstances." It is quite clear
 that Blackburn J. was not there basing his decision on the
 answer to the question whether the defendant was technically
 an arbitrator or not.

(1) L. R. 7 C. P. 39.

(2) L. R. 7 C. P. 525.

(3) Ibid. 528.

In *Tharsis Sulphur Co. v. Loftus* (1), the defendant was an average adjuster, and the cargo-owners and the ship-owners had agreed to refer to him the adjustment of a general average loss which had to be apportioned between the ship and the cargo. Bovill C.J. said (2): "It must constantly happen that parties are dissatisfied with the decision of an arbitrator or quasi-arbitrator, and yet we find, notwithstanding the facility with which speculative actions for negligence are brought upon the slenderest grounds, that there is no precedent for such an action for negligence as this." He then refers to *Pappa v. Rose* (3), and lays down that such an action is not maintainable. Keating J. said (2): "One of the most frequent grounds upon which actions of negligence are brought is not exhibiting due skill in the performance of a duty. Now, without deciding what is the proper definition of an arbitrator, it appears to me clear that the defendant is in the position of an arbitrator for the present purpose, inasmuch as he was a person by whose decision two parties having a difference agreed to be bound. It appears to me that the safe rule when parties agree to be bound by the decision of a third party on any matter is that they take him in such a case for better or worse; and if he discharges his duty faithfully and honestly they must be satisfied." Brett J. said that there were the strongest grounds for deciding against the claim in that case, and he went on: "Then it is said that the defendant is liable because he was not an arbitrator, but only a person who had undertaken to adjust accounts between two parties. Now the case of *Pappa v. Rose* (3) decides that a person who undertakes to give a decision between two parties as to any matter, though he may not be an arbitrator in the strict sense of the word, as not being bound to exercise all the judicial functions for the purpose of deciding the matter in dispute that an arbitrator in the strict sense of the term would have to exercise, nevertheless is not liable to an action for want of skill. It appears to me that the reasoning employed in that case is equally applicable to an action for want of care and that if an arbitrator in the strict sense of the word is not liable for want of care, it follows that a person who has undertaken to decide a dispute between two parties is also not liable."

In *Stevenson v. Watson* (4), matters of dispute were referred

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(1) L. R. 8 C. P. 1.

(3) L. R. 7 C. P. 32.

(2) Ibid. 7.

(4) 4 C. P. D. 148.

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to an architect under a building contract, and it was held that the architect occupied the position of an arbitrator. The matter is stated, as I think, correctly by Lord Coleridge C.J., who summed up the authorities and said (1): "I think this case is within the authority of the cases cited "which decide that where the exercise of judgment or opinion "on the part of a third person is necessary between two persons, "such as a buyer and seller, and, in the opinion of the seller, "that judgment has been exercised wrongly, or improperly, "or ignorantly, or negligently, an action will not lie against the "person put in that position when such judgment has been "wrongly, or improperly, or ignorantly, or negligently "exercised."

Lastly, Greer J. in *Boynton v. Richardson's* (2) reported only in the Weekly Notes, but nevertheless sufficiently reported, dealt with the matter. There, the defendants, a firm of surveyors and valuers, had been employed under a contract for the sale of growing timber, to value the timber for the purpose of ascertaining the proper purchase price. That case seems to me to be on all fours with the present. Greer J. is reported to have said that: "The valuation necessarily "involved an impartial consideration by the valuers as to the "measurement of the timber, the current price and similar "matters. They must hold the scales between the two "parties and under these circumstances no action for "negligence would lie against them. This rule extended not "only to arbitrators but to quasi-arbitrators, the test being "whether the person against whom want of care was alleged "was under a duty to exercise an impartial judgment between "the parties." Then he referred to *Pappa v. Rose* (3), and said that "*Chambers v. Goldthorpe* (4) was an authority "binding upon him in the present case, and it was clear from "*Tharsis Sulphur Co. v. Loftus* (5) that the principles there "laid down were not confined to the case of an architect "giving his certificate as to the amount due to the building "contractor, but applied to any person in the position of an "arbitrator or quasi-arbitrator, who ought to be able to "exercise his judgment free from the embarrassment of a "possible action for negligence." In my opinion those authorities apply to the cause of action alleged in the present

(1) 4 C. P. D. 148, 159.

(4) [1901] 1 Q. B. 624.

(2) [1924] W. N. 262.

(5) L. R. 8 C. P. 1.

(3) L. R. 7 C. P. 32.

case just as they would apply to the suggested alternative cause of action which Mr. Raeburn wished to bring in by amendment. I have already given the further reason why this statement of claim cannot stand, based, as it is, on an alleged warranty when there is, clearly, no warranty at all.

After his success before Asquith J. the plaintiff amended his statement of claim. He struck out the allegation of a warranty in the letter of July 31 and substituted a warranty alleged to be contained in the letter of July 27, in which the defendant's firm informed the plaintiff's solicitors that the award would be available for posting, subject to receipt of the necessary fees. The warranty alleged is that, in consideration of the payment to the defendant of the fees charged, he, the defendant, "would on or after July 31, 1942, furnish to the "respective parties (and, in particular, to the plaintiff) a "valuation of the said shares made in accordance with the "instructions set out in the agreement." That amendment to the pleadings seems to me to fail for exactly the same reasons as does the original plea. No warranty can be spelt out of the letter announcing that the award would be available for posting, subject to receipt of fees. The amendment is an attempt to import a new contract under which the defendant agreed to furnish a correct report in consideration of the payment of his fee. On the face of it that allegation cannot stand, having regard to the other matters pleaded.

That brings me to the other branch of the case, in which the plaintiff claims 256*l.* 5*s.*, his moiety of the fee claimed by the defendant. That sum is claimed in two alternative ways, first, as on a consideration which has wholly failed, and, secondly, as part of the damage suffered by the alleged breach of warranty. So far as it is based on warranty the claim must obviously go. So far as it is based on failure of consideration, it seems to me to be completely inconsistent with the whole basis of this pleading, in which it is asserted that the plaintiff is bound to accept the defendant's valuation—in other words, the defendant has produced a valuation which is binding on vendor and purchaser alike.

The result, in my opinion, is that the original claim, which was before Asquith J., and the amended claim which is before us—and also the suggested further amended claim which Mr. Raeburn wished to put in—are, all three, bad, having regard to the law on the subject. The appeal must be allowed, and the statement of claim struck out.

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GODDARD L.J. I agree. I think the statement of claim should be struck out and that no opportunity should be given to amend, because, from every aspect and notwithstanding the pleader's attempts to overcome the difficulties, this action is in substance brought by the plaintiff against the defendant for giving a wrong valuation, and that action will not lie. Mr. Raeburn seeks to distinguish the case from the authorities which have been cited by saying that they apply to an arbitrator only and not to a person in the position of a valuer. I need not repeat the passages read by the Master of the Rolls, which clearly show the contrary. The well-known case that Mr. Raeburn cited of *In re Carus-Wilson and Greene* (1) only goes to show that a valuer is not an arbitrator for purposes connected with the Arbitration Act. The proceeding in that case was a motion to set aside an award and the court refused to do so because what was before it was a valuation only. It is clear from *Pappa v. Rose* (2) that the court applies the doctrine that an action of this kind will not lie against a person who is not an arbitrator in the strict sense, but only a quasi-arbitrator. The distinction between an arbitrator and what the courts have called a quasi-arbitrator is not, I think, capable of precise definition. It depends on the nature of the matter submitted for decision and the reason for the submission. The question of the quality of an article being sold is often submitted for determination as between the parties to a commercial contract as it was in *Pappa v. Rose* (2). The person to whom the matter is submitted does not as a rule sit as an arbitrator to hear the parties and take evidence as an arbitrator must. The person appointed will be an expert in the trade who will look at the sample on which the goods were sold and at a sample of the goods delivered and fix the allowance to be made. This is constantly done in Mincing Lane, and the person who acts in this way is, perhaps, a quasi-arbitrator or even an arbitrator, but he is an arbitrator of a particular sort, and it is not intended that there should be the same judicial proceeding on his part as there would be in the case of an arbitrator appointed under a formal submission. It is clear from the cases cited that a valuer comes within the protection given to arbitrators when he occupies a position like that of the defendant in this case. The underlying principle is that, in accepting the task submitted to him, the valuer or arbitrator merely undertakes to give

(1) 18 Q. B. D. 7.

(2) L. R. 7 C. P. 32.

an honest decision between the parties. Mr. Raeburn contends that an action will lie against a person employed to determine the value of a piece of property by applying a certain formula, if it can be shown that he has not applied that formula. I think one must go much farther, and that it must be shown not only that he has failed to apply the formula, but also that he has refused to do so dishonestly or for some improper reason. I can well imagine a case in which some complicated formula might be devised between the parties and the matter then be submitted to an expert valuer who might say in terms: "I have fixed the price, but I have not applied all the terms of the formula, because, in my opinion, it is impracticable to do so." That would not be acting dishonestly. Whether the parties would be bound to accept the price as between themselves is another matter, but how an action would lie against the valuer in those circumstances I do not understand. It is clear in the present case that, if it were open to the plaintiff, as between himself and the purchaser, to dispute the figure at which the defendant has arrived on the ground that he has not assessed it in accordance with the contract, he would not have suffered any damage by what the defendant has done, but I am content to decide the case on the ground that, however this action is put, unless a charge of dishonesty or mala fides is made against the defendant, he cannot be liable in the circumstances alleged.

In an attempt to get round the difficulties created by the authorities, it is sought to set up a case of warranty by using that much-abused and hard-worked word in a way which I frankly cannot understand. The most that can be said in this case is that, in asking for his fees, the defendant made a bare representation that he had his report ready. He did not give any warranty. There is no trace of any collateral contract. The defendant as a person employed to do a piece of work and entitled to be paid for it simultaneously with his handing over the result, simply said: "I am ready to give you the report which I undertook to make, and I will give it to you in return for the fees due to me." There is no trace of warranty about that. There is, then, no cause of action in warranty.

With regard to the remaining point, the plaintiff cannot have it both ways. The plaintiff says that a valuation has been made which is binding between the parties. If so, obviously there was not a total failure of consideration. Unless and until the plaintiff can bring himself to make a

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 1943 there is no case against the defendant. Therefore, the state-
 FINNEGAN ment of claim must be struck out. It is not a case in which
 v. we should give an opportunity of further amendment.
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Appeal allowed.

Solicitors: *J. F. Chadwick; Hyman Stone & Co., London and Sheffield.*

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CONWAY v. STOCKS.

Emergency legislation—Control of employment—Essential work—Absence from work—Reference to "appropriate committee"—Existence of committee in the undertaking—Effect of opinion of national service officer—Evidence—Certificate of officer—Essential Work (General Provisions) Order, 1942 (St. R. & O., 1942, No. 371), art. 6A (2.), (4.)—Essential Work (General Provisions) (Amendment) Order, 1942 (St. R. & O., 1942, No. 583), art. 3.

For the purpose of art. 6A of the Essential Work (General Provisions) Order, 1942 (as amended by the Essential Work (General Provisions) (Amendment) Order, 1942), the opinion of the national service officer that there does not exist in the undertaking concerned a works committee or other joint council which can appropriately deal with an allegation that a "specified person" employed in the undertaking has absented himself from work without reasonable excuse is final and conclusive.

CASE stated by justices.

At a court of summary jurisdiction sitting at Otley (West Riding of Yorkshire), the appellant, Edward Conway, a national service officer duly appointed under reg. 58A of the Defence (General) Regulations, 1939, preferred three informations against the respondent, Frank Stocks, for that he being a "specified person" within the meaning of the Essential Work (General Provisions) Order, 1942 (1), did on July 20,

(1) By Essential Work (General Provisions) Order, 1942, art. 6A (added by art. 3 of the Essential Work (General Provisions) (Amendment) Order, 1942): "(1.) 'A specified person shall not—'
 "(a) absent himself from work unless he has reasonable excuse. (2.) Where a specified person has absented himself from work the person carrying on the undertaking may report the matter to a national service officer, and that

22 and 24, 1942, absent himself from work with his employers, contrary to the Essential Work Orders, 1942. At the material time the respondent's employers carried on an undertaking which was scheduled by the Minister of Labour and National Service under the Essential Work (General Provisions) Order, 1942, in respect of all persons employed therein, and the respondent was employed in this undertaking as a fitter and was a "specified person" within the meaning of the order. On July 20, 22 and 24, 1942, the respondent absented himself from work. On August 17, 1942, the appellant, pursuant to art. 6A (4.) of the Essential Work (General Provisions) Order, 1942 (as amended by St. R. & O., 1942, No. 583), certified that at the date of a report in writing on the matter to him by the respondent's employers, pursuant to art. 6A (2.) of the order, an "appropriate committee" to whom the matter could be referred did not exist in the undertaking. At the date of the report there existed in the undertaking a works committee which was composed of representatives of the employees, but did not include any representatives of the employers. The appellant did not require the respondent's employers to refer to this works committee the matter of the respondent's absence from work and the matter was never referred to that committee. The justices held that the opinion of the national service officer was not conclusive on the

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" officer shall, if there exists in
" the undertaking a works com-
" mittee or other joint council
" which in his opinion can appro-
" priately deal with the matter
" (hereinafter in this article re-
" ferred to as an 'appropriate
" 'committee'), require the
" person carrying on the under-
" taking to refer the matter to
" that committee unless the
" matter has already been referred
" to it. (3.) Where at the date
" of any such report as aforesaid
" an appropriate committee exists
" in the undertaking in which the
" specified person is employed,
" proceedings shall not be in-
" stituted against that person
" for an offence against reg. 58A
" of the Defence (General) Regula-
" tions, 1939, for a contravention

" of or failure to comply with any
" of the provisions of para. (1.)
" of this article unless—(a) the
" matter has been referred to the
" committee . . . (4.) On the
" prosecution of any person for
" an offence against reg. 58A of
" the Defence (General) Regula-
" tions, 1939, for a contravention
" of or failure to comply with any
" of the provisions of para. (1.)
" of this article—(a) a certificate
" purporting to be signed by a
" national service officer that at
" the date of any such report to
" him as aforesaid an appropriate
" committee did not exist in the
" undertaking . . . shall be
" sufficient evidence of the facts
" stated therein unless the con-
" trary is proved."

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question whether there existed in the undertaking an "appropriate committee" at the date of the report, but that that question was open to them. They found that there was an "appropriate committee" in the undertaking at the date of the report, and, there having been no reference to that committee, they dismissed the informations under art. 6A (3.) of the order. The appellant appealed.

Arthian Davies for the appellant. The justices misdirected themselves. From the language used in para. 2 of art. 6A, it is clear that the question whether an "appropriate committee" exists in the undertaking at the time of the report is for the decision only of the national service officer. Once his opinion is established, either by his certificate or his oral evidence, it is conclusive on that issue. The only facts stated in the certificate, provided for by para. 4 of art. 6A, which can be disproved by evidence are (1.) that the signature is that of the national service officer, and (2.) that his opinion is that no appropriate committee existed in the undertaking at the time of the report.

The respondent did not appear.

VISCOUNT CALDECOTE C.J. The question for our consideration is what is an "appropriate committee"? It appears from para. 2 of art. 6A that it is "a works committee" or "other joint council," which, in the opinion of the national service officer, "can appropriately deal with the matter." That officer is made the authority to decide whether, or not, there exists in the undertaking at the relevant time a committee which can deal with the matter. The opinions of all other persons on this question are immaterial. If the national service officer, acting in good faith, forms the opinion that there exists in the undertaking such a committee, the matter of the specified person's absence from work must be referred to that committee before proceedings are instituted against him for an offence under reg. 58A of the Defence Regulations. If, in his opinion, there exists no committee which can appropriately deal with the matter, there is no "appropriate committee" in fact, and nothing to prevent proceedings being instituted forthwith.

Article 6A, para. (4.), provides, obviously for reasons of convenience, that, on a prosecution for a failure to comply with the provisions of para. (1.) of the article, a certificate

purporting to be signed by a national service officer that at the date of the report an "appropriate committee" did not exist in the undertaking "shall be sufficient evidence of the facts stated therein unless the contrary is proved." I am not surprised that the justices were misled by the final words of the paragraph into thinking that they permitted the bench itself to inquire into the question whether or not there existed in the undertaking an "appropriate committee." The term "appropriate committee," however, is one of art to describe a committee which can, *in the opinion of the national service officer*, appropriately deal with the matter. As a result, the only facts stated in the certificate of which the contrary can be proved by evidence are that the certificate was signed by the national service officer and that it was the officer's opinion that such a committee did not exist. There is no other fact of which the certificate would be sufficient evidence in the absence of evidence to the contrary. The justices erred in thinking that it was open to them to decide whether a works committee or other joint council existed in the undertaking which could appropriately deal with the matter, for the language of the article makes it clear that it is the opinion of the national service officer alone which is relevant and that his opinion is final and conclusive in the matter. The case, therefore, must be remitted to the justices that they may deal with the question whether there was reasonable excuse for the absence from work of the specified person.

LEWIS J. I agree with my Lord for the reasons which he has given. In my view, the contentions of the national service officer set out in the case stated are right. They were (1.) that, by para. (2.) of art. 6A of the Essential Work (General Provisions) Order, 1942, an "appropriate committee" means a works committee or other joint council which, in the opinion of the national service officer, can appropriately deal with the matter, and (2.) that as, in the opinion of the national service officer, as proved by his certificate and his oral evidence given before the justices, there did not exist in the undertaking in the present case a committee which could appropriately deal with the matter of the specified person's absence from work, there was no "appropriate committee," and it was not open to the justices to go behind the opinion of the national service officer and to find that the works committee which in fact existed in the

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undertaking was an appropriate committee within the meaning of the article.

CASSELS J. I agree.

Case remitted.

Solicitor for the national service officer : *Solicitor, Ministry of Labour and National Service.*

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C. A. IDEAL LIFE ASSURANCE COMPANY, LIMITED v. H. J. HIRSCHFIELD AND A. H. HIRSCHFIELD.

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Emergency legislation—War Damage—Contribution—Mortgagor—Right over against mortgagee—Mortgage created "on the occasion of, and "in connexion with," the acquisition of an interest in more than one contributory property—Underleases purchased in one transaction—Separate mortgage of each house—War Damage Act, 1941 (4 & 5 Geo. 6, c. 12), s. 25, sub-s. 5.

The proviso to sub-s. 5 of s. 25 of the War Damage Act, 1941 (which section gives to contributors of war damage contribution rights over against mortgagees), excludes from the benefit of the section a mortgage "which was created on the occasion of, and "in connexion with, the acquisition by a person of an interest "in . . . more than one contributory property."

The expression "on the occasion of" is not equivalent in meaning to the phrase "on the same date as," but may rather be interpreted as "at or about the time of," with the implication that the coincidence in time is designed and not accidental. The words "and in connexion with" emphasize the fact that it is not sufficient to show that the mortgage was created at or about the time of the acquisition of the interest, but that a connexion between the mortgage and the acquisition of the interest must be established.

The proviso is not limited in its application to cases in which more than one contributory property is included in the same mortgage. Where the interest in a number of underleases has been acquired in a single transaction and money has been borrowed on mortgage on each of the houses, each mortgage must be deemed to have been created "on the occasion of, and in "connexion with" the acquisition of the interest in each of the other houses, and so the mortgagor is excluded from the benefit of the section.

APPEAL from Birmingham county court.

In 1939 the second defendant, Adolph Henry Hirschfield, being desirous of raising a loan of 6000*l.*, granted underleases of ten plots of land with the houses erected thereon (forming

part of a building estate which he held on a 99 years' lease) to his son, the first defendant, Howard Julius Hirschfield. The consideration for the underleases was in each case 800*l.* Four of the underleases were dated May 18, two May 25, two June 8, and two July 6, 1939. On the same dates the first defendant, by ten separate mortgages, mortgaged his interest in each of the ten houses to the plaintiffs, Ideal Life Assurance Co., Ltd., for 600*l.*, which he paid to the second defendant, and he also granted to the second defendant a second mortgage in each case for 200*l.* as security for the balance of the 800*l.* The second defendant guaranteed the payment of the mortgage interest payable to the plaintiffs. The mortgages granted to the plaintiffs were in common form, and each contained a provision that s. 93 of the Law of Property Act, 1925 (restricting the mortgagee's rights of consolidation), should not apply. The first defendant, when paying the mortgage interest, deducted therefrom sums in respect of war damage contributions in accordance with s. 28 of the War Damage Act, 1941. The plaintiffs denied liability to indemnify the defendants for war damage contributions on the ground that s. 25 of the War Damage Act, 1941, which gives to contributors of war damage contribution rights over against mortgagees in certain cases, did not apply since the transaction was a single transaction, designed to obtain for the second defendant a loan of 6000*l.* on the security of a mortgage of ten houses the contributory value of which exceeded 150*l.*: see s. 25, sub-s. 4, of the War Damage Act, 1941 (1), or, alternatively, since each mortgage was created on the occasion of, and in connexion with, the acquisition of an interest by the first defendant in more than one contributory property: see proviso to s. 25, sub-s. 5, of the Act (1). In the present

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(1) War Damage Act, 1941, "the acquisition of that interest s. 25, sub-s. 4: "This section "by the contributor or a pre- "applies to a contributory pro- "decessor in title . . . or was "perty the contributory value of "substituted for a mortgage so "which does not exceed 150*l.* and "created. Provided that this "which consists of or comprises "section shall not apply to a "premises used or suitable for use "mortgage which was created on "for residential purposes" "the occasion of, and in connexion "Sub-s. 5: "This section applies "with, the acquisition by a person "to a mortgage of the interest of "of an interest in . . . more "a direct or indirect contributor "than one contributory property, "which was created to secure a "or was substituted for a mortgage "capital sum on the occa- "so created."

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action the plaintiffs claimed a balance of mortgage interest, amounting to 52*l.* 5*s.* 8*d.* The county court judge gave judgment for the defendants, holding that the underlease of each house was in law a separate and distinct property created by a separate deed, that there was not one mortgage by the first defendant of all the properties, but ten distinct mortgages each dealing with a separate contributory property, and, therefore, that the proviso to s. 25, sub-s. 5, did not apply. The plaintiffs appealed.

Sir Norman Touche for the plaintiffs. The decision of the county court judge was wrong. Under sub-s. 4 of s. 25 the section applies to a contributory property, the contributory value of which does not exceed 150*l.* In the present case the contributory value of each of the houses was less than 150*l.*, but the total contributory value of the houses exceeded 150*l.* Moreover, each mortgage was created on the occasion of, and in connexion with, the acquisition of an interest in more than one contributory property, and so the application of s. 25 is again excluded. The test whether the proviso to s. 25, sub-s. 5, applies is whether the case comes within the words of the proviso, and not, as held by the county court judge, whether there was one mortgage comprising all the properties. The section is arbitrary and was intended to carve out an exception in favour of the small contributor.

Harold B. Williams for defendants. The proviso to s. 25, sub-s. 5, lays down two conditions, namely, that the mortgage was created "on the occasion of" and "in connexion with" the acquisition of an interest. Both those conditions must be present to bring a mortgage within the proviso. The words "a mortgage" must have relation to the document itself, and what has to be looked at is not a series of transactions but each individual mortgage. These mortgages are separate and distinct transactions, and each has no connexion with any other contributory property charged under another mortgage. The proviso is intended to apply to cases where more than one contributory property is included in one mortgage, the interest in which properties is being acquired on the one occasion.

Cur. adv. vult.

Apr. 9. The judgment of the court (SCOTT, LUXMOORE and DU PARCQ L.JJ.) was read by DU PARCQ L.J. This appeal

raises a question of some difficulty as to the construction of a few words in s. 25 of the War Damage Act, 1941. Before the question can be decided it seems to be desirable to ascertain the purpose of the section. That purpose must be inferred from the language and tenor of the Act. The legislature has singled out a particular class of mortgagors on whom to confer the benefit which s. 25 provides. In order that a mortgagor may be included in this class, the following conditions must be fulfilled: (1.) The mortgage must be a mortgage of an interest in a dwelling-house or in agricultural land and buildings; (2.) the premises which are the subject of the mortgage must be of a value not exceeding the values specified in the section; (3.) the mortgage must have been "created" both "on the occasion of, and in connexion with" the acquisition of that interest in the premises which is the subject of the mortgage, or "on the occasion of, and in connexion with," the execution of works for the benefit of the premises. If one stops at this point and considers the section apart from the proviso, it is, we think, reasonably plain that one object of the section is to relieve the purchaser of a dwelling-house or farm of moderate value, who, in order to acquire the premises, finds it necessary to borrow part of the purchase money on mortgage. A person who, having purchased a house, subsequently mortgages it to raise money for other purposes gets no assistance from the section, unless his purpose is the execution of such works as are defined therein. The mortgage must be created not only "on the occasion of" but also "in connexion with" the acquisition of the interest. The words "in connexion with" were probably inserted because, without them, the section might be read as benefiting a mortgagor who, shortly after the purchase, mortgaged the premises to provide money for some purpose unconnected with the purchase or the premises. Without those words, the expression "on the occasion of" would not have been adequate to prevent such a construction. That expression is not equivalent in meaning to the phrase "on the same date as." An "occasion" is not a period of twenty-four hours. If we say that a man took out an assurance policy on the occasion of his marriage, we do not mean "on the day of his marriage," but rather "at or about the time of his marriage," with the implication that the coincidence in time was designed and not accidental. The words "and in connexion with" emphasize the fact that it is not sufficient

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to show that the mortgage was created at or about the time of the acquisition. A connexion between the mortgage and the acquisition of the interest must be established.

So far, the legislature has brought within the ambit of the section those who borrow on mortgage in order to buy their houses or farms, but it has done nothing to exclude the man who buys a number of houses or farms at one time and borrows money on one or more of them. It is easy to understand, especially if regard be had to the fact that only premises of less than a certain value are within the section, that Parliament would not wish to give relief to such a mortgagor. On the other hand, Parliament might well think it wrong to shut out from the benefit of the section a man who, at or about the time when he bought a house, was also buying other premises by way of an entirely different transaction, for example, buying a shop in which to carry on business. If this interpretation is right (and no other was suggested which would give a logical basis to the section), the intent and meaning of the proviso become intelligible. The words "on the occasion "of and in connexion with," which reappear in the proviso, no doubt present a difficult problem of construction, but the problem is less baffling when viewed in the light of what we conceive to be the intention of the legislature.

When, as in the present case, the interest in a number of houses has been purchased in a single transaction, and money has been borrowed on mortgage on each of the houses, we are of opinion that each mortgage was "created on the occasion "of and in connexion with" the acquisition of the interest in each of the other houses. We find it impossible to say, looking at the facts of this case, that each house was the subject of a separate and distinct transaction, in the sense that there was no connexion between the several transactions. The granting or "creation" of the mortgages and the acquisition of the interest in all the houses were, in truth, part of one transaction, and the period of time covered by that transaction was an "occasion." If, as we think, the transaction is rightly to be regarded as one, then its constituent parts are necessarily "connected." The words "in connexion with" are not a term of art. They must be construed in accordance with their ordinary meaning and, if that criterion be applied, we are of opinion that the required connexion must be held to be established.

It was conceded by Mr. Williams that, if the first-named

defendant had mortgaged all the houses together to secure repayment of the total sum advanced, the proviso would have been applicable. He contended, however, that the proviso applied only to cases in which more contributory properties than one were included in the same mortgage. While we appreciate the force of his submission, which in substance repeated the reasoning of the learned judge, we are unable to accept it. If Parliament had meant to say only that the section was not to apply where more properties than one were included in the mortgage, we cannot doubt that it would have said so in language at once more simple and more apt to express its meaning. Further, it is pertinent to observe that, if that were indeed what Parliament intended, no intelligible reason for the proviso could be suggested. There may be many cases in which it will be difficult to say whether the necessary "connexion" has been established, and the question may sometimes resolve itself into one of fact. In the present case Mr. Williams frankly conceded that, if the view which we have expressed were adopted, no conclusion would be possible on the admitted facts except that the proviso was applicable to them.

For the reasons stated, we have come to a different conclusion from that of the learned judge. If, as we think, he was in error, the error was admittedly an error in point of law. The appeal will be allowed, and judgment entered for the plaintiffs for the sum of 52*l.* 5*s.* 8*d.*, with costs here and below.

Appeal allowed.

Solicitors for plaintiffs: *Ward, Bowie & Co., for Duggan, Elton & James, Birmingham.*

Solicitors for defendants: *Sweepstones, for Parkhouse & Allée, Birmingham.*

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HIRSCH-
FIELD.

C. A. PRUDENTIAL ASSURANCE COMPANY, LIMITED v.
REVILLE, LIMITED.

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Mar. 29, 30 ;

Apr. 13. *Emergency legislation—War damage—Ground lease—Notice of retention—Reduced rent—Date from which reduction should operate—County court—Application by lessors for determination whether lessees should be allowed to exercise right of retention of lease as multiple lease—Alternative application to court to fix period in respect of which reduced rent payable as under ground lease—Withdrawal by lessors of first application—Duty of county court judge—Landlord and Tenant (War Damage) Act, 1939 (2 & 3 Geo. 6, c. 72), s. 10, sub-s. 1 (c) ; s. 15—Landlord and Tenant (War Damage) (Amendment) Act, 1941 (4 & 5 Geo. 6, c. 41), s. 2, sub-s. 5 ; s. 10, sub-ss. 1, 2 ; sch.—County Court Rules, 1936–1941, Or. xv., r. 6.*

In 1940 premises which had been let by the lessors to the lessees on a lease which was both a ground lease and a multiple lease within s. 24 of the Landlord and Tenant (War Damage) Act, 1939, suffered war damage within the meaning of that section. On August 7, 1941, the Landlord and Tenant (War Damage) (Amendment) Act, 1941, became law and a tenant under a ground lease was then entitled to serve on the landlord a notice of retention of that lease. On November 19, 1941, the lessees served a notice of retention on the lessors. It was agreed between the parties that part of the premises were capable of beneficial occupation and that the lessees should pay a reduced rent in respect of that part. On December 18, 1941, the lessors applied to the county court to determine under s. 15 of the Act of 1939 (as amended by s. 2, sub-s. 5, of and sch. 10, the Act of 1941) whether the lessees should be allowed to exercise the right of retention of the lease as a multiple lease, and, alternatively, under s. 10, sub-s. 1 (c), of the Act of 1939, that the court should direct that there should be payable under the lease as a ground lease a reduced rent and in respect of what period. Before the county court judge the lessors abandoned the first application. The county court judge held that they were entitled to do so under Or. xv., r. 6, of the County Court Rules, and he then dealt exclusively with the effect of s. 10, sub-s. 1 (c) :—

Held, that, whether s. 10 or s. 15 (as amended) of the Landlord and Tenant (War Damage) Act, 1939, be regarded as the source of the lessees' rights, the reduction of rent to which they were entitled could only operate as from the date of the service of the notice of retention.

Held, further, that the county court judge was wrong in refusing to consider the effect of s. 15 (as amended), his duty being to make an order which was fair to both parties in the light of all relevant legislation.

APPEAL from Westminster county court.

The lessees, Reville, Ltd., were the tenants under a lease for

ninety-nine years of premises at a rent of 2000*l.* a year. The lease was a ground lease, and also a multiple lease within the definition of s. 24 of the Landlord and Tenant (War Damage) Act, 1939. In September and December, 1940, the premises suffered war damage within s. 24. At that date it was not open to the lessees to give to the lessors, the Prudential Assurance Co., a notice of retention as s. 13, sub-s. 2, of the Act of 1939 expressly precluded the giving of such a notice in the case of a ground lease. The lessees did not seek permission to disclaim the lease, and the position was that, while they were under no obligation to make good war damage, they remained liable to pay the full rent. On August 7, 1941, the Landlord and Tenant (War Damage) (Amendment) Act, 1941, became law, which by s. 10 made the Act of 1939 apply to ground leases and gave a tenant holding under a ground lease the right to serve a notice of retention. Early in 1941 the premises were requisitioned by the Crown, and the greater part of the damage was repaired at the public expense. It then became advantageous for the lessees to hold the premises, and on November 19, 1941, they served a notice of retention on the lessors. It was agreed between the parties that a large part of the premises was capable of beneficial occupation and that the rent properly payable in respect of that part was 1600*l.* The lessees, however, contended that the reduction of rent from 2000*l.* to 1600*l.* should operate retrospectively from the date of the damage, while the lessors refused to agree to a reduction for any period before the date of the service of the notice of retention. On December 18, 1941, the lessors applied to the county court under s. 15 of the Landlord and Tenant (War Damage) Act, 1939, as amended by the Landlord and Tenant (War Damage) (Amendment) Act, 1941, s. 2, sub-s. 5, and sch. (which deals with multiple leases), to determine whether the lessees should be allowed to exercise the right of retention, and if so, to what extent. Alternatively, they applied, under s. 10, sub-s. 1 (c), of the Act of 1939, on the footing that part of the property was capable of beneficial occupation, to the court to direct that there should be payable by the lessees such rent at such times and in respect of such period as the court might fix. Before the county court judge the lessors intimated that they abandoned the application under s. 15 (as amended) and wished to proceed solely with that under s. 10, sub-s. 1 (c). The lessees, who wished to contend that the proviso to sub-s. 5 of s. 15 (as

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amended) gave the court power to reduce the rent reserved by the lease as from the date of the damage, objected, but the county court judge held that under Or. xv., r. 6, of the County Court Rules, 1936-1941, the lessors were entitled to withdraw their application for relief under s. 15. Dealing with the application under s. 10, sub-s. 1 (c), he fixed the reduced rent as payable from the date of the giving of the notice of retention. The lessees appealed.

M. Turner-Samuels for the lessees.

Denning K.C. and *Dare* for the lessors.

The arguments appear sufficiently from the judgment.

Cur. adv. vult.

Apr. 13. The judgment of the court (SCOTT, LUXMOORE and DU PARCQ L.JJ.) was read by DU PARCQ L.J. who stated the facts, and continued: As the county court judge had used language which, whether he intended it to be so understood or not, had been taken by the lessees to indicate that he would have been in favour of their main contention if he had felt at liberty to consider s. 15, they not unnaturally felt a sense of grievance. In our opinion, the learned judge was wrong in refusing to consider s. 15. Mr. Denning was not prepared to argue that a withdrawal at the hearing of an application by a landlord under that section prevents the tenant from asking the judge to consider its bearing on the rights of the parties under it. It is, indeed, manifest that, if the view taken by the judge on this point were right, injustice might result in many cases. The learned judge felt that he was bound to come to this decision because of the construction which he placed on Or. xv., r. 6, of the County Court Rules, but, with great respect to him, we are of opinion that this rule had nothing to do with the application before him. The rule refers to actions and to the right of a plaintiff to abandon part of his claim in an action—a course which it is sometimes desirable to take in the county court where there is a doubt about the jurisdiction of the court to deal with the whole of the claim. It has no relevance to a case like the present where, on an application being made by one party, it becomes the duty of the judge to make an order which is fair to both parties in the light of all relevant legislation.

Mr. Denning submitted, however, that if the learned judge

had dealt with the application under s. 15, and the result had been that the court was not satisfied that it was equitable to allow the lessees to exercise the right of retention and so had ordered that the notice of retention should "cease to have effect," the court would still have had no power to order that the rent should be reduced except from the date of the notice of retention. If this submission is sound, clearly the appeal should be dismissed, as on that view the judge's order was right. If we correctly understood the argument of Mr. Turner-Samuels, it may be summarized as follows: (1.) He preferred to rely on the proviso to s. 15, sub-s. 5 (as amended), which, he said, was plain and unambiguous, and gave the court power, and, indeed, made it the duty of the court, to reduce the rent from the date of the damage. He contended that s. 10 was, in the circumstances of this case, irrelevant. (2.) He contended that, if the judge had held that the notice of retention was "of no effect," the notice would have disappeared for ever from the case, so that its date could not be taken as the terminus from which the reduction in rent could be ordered. (3.) Alternatively, he submitted that the judge was wrong in his construction of s. 10, and that his powers were as ample thereunder as under s. 15. It thus became necessary for this court to consider not only the two sections directly in question, but the framework of the Act and such other sections as throw light on the problem. Mr. Turner-Samuels was very reluctant to allow our attention to be diverted from s. 15. Indeed, he concentrated his argument on the proviso to sub-s. 5 of that section with a single-minded devotion which led him to ignore the rest of the section and of the Act, but Mr. Denning, for the lessors, in a valuable argument directed our attention to every part of the Act which could assist us.

We have come to the conclusion that whether s. 15 or s. 10 is to be regarded as the source of the lessees' rights, no order could properly have been made which would have been more favourable to them than that which is the subject of this appeal. Before dealing more particularly with the two sections, two observations of a general character should be made. First, it is by no means self-evident that justice requires that the tenant should be relieved in respect of his rent as from the date of damage which occurred before the service of a notice of retention and (as in this case) before the passing of the amending Act. The tenant may well think that it is hard to be obliged to pay a full rent for premises which may have

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lost all, or much of, their value. On the other hand, a landlord who has been paid rent, possibly under a judgment of the court, to which he was unquestionably entitled, might well feel a sense of grievance if he were compelled by retrospective legislation to repay it. Secondly, it is impossible to read the Act as having this retrospective operation in the absence of clear language showing that it was the intention of the legislature that it should be so construed.

When ss. 10 and 15 are read with these observations in mind, we find it impossible to accept the lessees' contention. Sect. 10 is, no doubt, so drawn as to give large powers to the judge, but the best that the tenant can get under it is an order that no rent shall be payable "in respect of the period" "beginning with the date when the notice was served," and when sub-s. 1 is read as a whole, it is, we think, impossible to hold that, while, under s. 10, sub-s. 1 (b), the notice is the terminus from which no rent is to be payable, under s. 10, sub-s. 1 (c), the court may fix a period for the payment of a reduced rent beginning at some earlier date. Further, it is important to notice that, if the court is satisfied that the notice of retention should stand, the tenant will take both the benefit and the burden which the Act prescribes. He will for a time escape payment of rent, but he will at once come under an obligation to repair although the performance of the obligation will in some cases be deferred. The argument for the lessees necessarily supposes that, from the date of the damage, they may be put in the position of enjoying the benefit without having borne the burden, which might be a substantial burden, because in certain cases it was "reasonably practicable" to render land fit even in 1940 and 1941. We cannot suppose that the legislature intended this result to follow, nor can we believe that a provision for repayment of rent paid after the occurrence of war damage can be implied in the section. It may be observed that in a case where Parliament intended to make rent paid by the tenant recoverable by him, its intention was plainly expressed : see s. 13 of the Act of 1941.

All the considerations mentioned in relation to s. 10 apply equally to s. 15 which has to be read with it. Mr. Turner-Samuels' contention that the circumstances in which the proviso to s. 15, sub-s. 5, applies are such that the notice of retention must be wholly disregarded and that the proviso must be interpreted as if there had never been a notice of

retention seems to us to be wholly erroneous. The words in sub-s. 5 which precede the proviso make it plain that the application before the court is the foundation of the court's power under the proviso. The occasion of the application is the notice of retention, and we can find nothing in the Act empowering the court to interfere with the rights and liabilities of the parties during the period antecedent to the notice. A provision that a notice "shall cease to have effect" is not equivalent to a provision that it is to be regarded as a nullity for all purposes.

For these reasons we are of opinion that the learned judge rightly construed s. 10, and that, if he had founded his decision on s. 15, he would, or ought to, have come to the same conclusion, and that his order was right and must be affirmed. It was suggested during the course of the argument that it might be open to a judge, in ordering a reduction of the rent from the date of the notice, to take into account in assessing the amount of rent payable the fact that for some time before the notice the tenant had paid the full rent for premises the value of which was much diminished. Mr. Turner-Samuels did not adopt this argument, and in this we think that he was right. It could not have assisted him because the parties in the present case had agreed that the rent payable as from the date of the notice should be 1600*l.* a year, and it was not open to him to submit at this stage that the amount payable from that date should be reduced. We mention the point because it was not fully argued and in order to say that we reserve the question whether it is open to the judge, in a proper case, to have regard to conditions before the notice of retention when he fixes the reduced rent payable after the notice of retention. Our inclination at present is against this view, but we express no final opinion upon it. The appeal will be dismissed with costs.

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LD.*Appeal dismissed.*Solicitors for lessees : *Cohen & Cohen.*Solicitor for lessors : *C. Howe Browne.*

R. F. S.

NOTE.

Landlord and Tenant (War Damage) Act, 1939, s. 4, sub-s. 1 :
 "Where the land comprised in a lease is unfit by reason of war damage,
 "the following provisions of this section shall have effect, whether the
 "lease was made before or after the commencement of this Act,"

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Sub-s. 2 : " The tenant may serve on the landlord either—(a) a notice (hereafter in this Act referred to as a 'notice of disclaimer') stating that he elects to disclaim the lease ; or (b) a notice (hereafter in this Act referred to as a 'notice of retention') stating that he elects to retain the lease on the terms hereafter specified in this Act."

Sub-s. 3 : " The landlord may, if no such notice has been served by the tenant, serve upon the tenant a notice (hereafter in this Act referred to as a 'notice to elect') requiring the tenant to serve on him, within the period allowed under this Act, either a notice of disclaimer or a notice of retention."

Sect. 10, sub-s. 1 : " Where a notice of retention is served or is deemed to have been served in respect of a lease, then, unless the notice of retention is of no effect under this Part of this Act or the notice to elect by virtue whereof the notice of retention is deemed to have been served is of no effect under this Part of this Act, the lease shall have effect subject to the following modifications :—(a) There shall be implied in the lease, notwithstanding anything in Part I. of this Act, a covenant by the tenant with the landlord that the land comprised in the lease shall be rendered fit as soon as is reasonably practicable after the date when the notice was served or is deemed to have been served . . . : (b) Subject to the powers of the court under the following provisions of this subsection, no rent shall be payable by the tenant under the lease in respect of the period beginning with the date when the notice was served or is deemed to have been served and ending with the date on which the land is rendered fit : (c) Where the court is satisfied, on the application of the landlord made at any time before the land has been rendered fit, that part of the land is capable of beneficial occupation, the court may direct that there shall be payable by the tenant such rent, at such times and in respect of such period as the court may fix . . .

Sect. 15 contained provisions as to multiple leases not being a ground lease.

Landlord and Tenant War (Damage) (Amendment) Act, 1941.

Sect. 2, sub-s. 5 : " . . . section fifteen of the principal Act (which contains provisions as to leases comprising two or more tenements) shall have effect as set out with modifications in the . . . Schedule [to this Act]."

Sect. 10, sub-s. 1 : " The principal Act shall apply to ground leases in like manner as it applies to other leases, and accordingly sections thirteen and fourteen of that Act shall cease to have effect."

Sub-s. 2 : " A notice of disclaimer, a notice of retention, or a notice to elect may be served under section four of the principal Act in respect of war damage to land comprised in a ground lease, whether the damage occurred before or after the passing of this Act."

Sect. 17, sub-s. 1 : " In this Act the expression ' the principal Act ' means the Landlord and Tenant (War Damage) Act, 1939."

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" Sect. 15 of the principal Act as modified."

Sect. 15, sub-s. 1 : " In relation to a multiple lease section six of this Act shall not apply and the other provisions of this Part of this Act shall have effect subject to the modifications specified in this section."

Sub-s. 2 : " Where a notice of disclaimer, a notice of retention or a notice to elect is served with respect to the lease—(a) the person serving the notice or the person on whom it is served ; or (b) any other person having an interest in or derived out of the term created by the lease, or having an interest in the reversion immediately expectant on the determination of the lease ; may apply to the court, within one month from the service of the notice, to determine the question whether the tenant should be allowed to exercise the right of disclaimer or retention, either as respects the lease as a whole or as respects one or more of the separate tenements comprised therein, or should not be allowed to exercise that right at all."

Sub-s. 3 : " If on such an application the court is satisfied that, having regard to the war damage suffered by the land comprised in the lease as a whole and all the circumstances of the case (including any offers made by the landlord for an extension of the term of the lease or for an alteration of the rent reserved thereby or for any other modification of the terms of the lease) it is equitable to allow the tenant to exercise the said right in respect of the lease as a whole, the court shall give a direction accordingly, and any notice of disclaimer or retention already served shall have effect under this Part of this Act"

Sub-s. 5 : " If on such an application the court, having regard to the matters referred to in subsection (3.) of this section, is not satisfied that it is equitable to allow the tenant to exercise the right of disclaimer or retention as respects the lease as a whole or as respects one or more of the separate tenements comprised therein, the court shall direct that the land comprised in the lease shall not be deemed to be unfit for the purposes of this Part of this Act and that any notice of disclaimer, notice of retention or notice to elect relating thereto shall cease to have effect :"

" Provided that the court may, if having regard to the extent of the war damage suffered by the land it considers it equitable to do so, order that the rent reserved by the lease shall, until the war damage is made good, be reduced to such extent as may be specified."

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Criminal law—Perjury—Statement in a "judicial proceeding"—"Tribunal having power to receive evidence on oath"—Special Commissioners of Income Tax—Two commissioners sitting—Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), s. 1, sub-ss. 1, 2—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), s. 137, sub-s. 4 ; s. 230, sub-s. 2.

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Two Special Commissioners of Income Tax sitting to hear an appeal against an assessment to sur-tax constitute a tribunal having by law power to receive evidence on oath, within the meaning of s. 1, sub-s. 2, of the Perjury Act, 1911, and, therefore, a person lawfully sworn as a witness before such a tribunal who wilfully makes a statement material in the proceeding which he knows to be false may be convicted of perjury under s. 1, sub-s. 1, of the Act.

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APPEAL against conviction.

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The appellant, Henry Rupert Hood-Barrs, was indicted at the Central Criminal Court on two counts charging him with perjury, contrary to s. 1, sub-ss. 1 and 2, of the Perjury Act, 1911, in respect of answers given by him on oath to two questions put to him in the course of evidence given by him before two Special Commissioners of Income Tax on an appeal by him against an assessment to sur-tax for the tax year 1938-1939. The appellant was found guilty and sentenced to twelve months' imprisonment and was ordered to pay a fine of 2500*l.* The appellant appealed (*inter alia*) on the ground that the statements made by him were not made in a judicial proceeding before a properly constituted judicial tribunal.

Serjeant Sullivan K.C., King K.C. and Quass for the appellant. There was no judicial tribunal here within the meaning of the Perjury Act, 1911, s. 1, sub-ss. 1 and 2, before whom the statements on oath were made by the appellant. Sect. 230 of the Income Tax Act, 1918 (1), provides that anything required to be done by Special Commissioners may be done by two or more commissioners, "save as otherwise expressly provided by this Act." Sect. 230 by implication contains such an express provision since it enacts that in the case of an appeal, "if it appears to the majority of the commissioners" that the appellant is overcharged, the commissioners may abate or reduce the assessment. There cannot be a majority at a hearing by two commissioners

(1) By Perjury Act, 1911, s. 1, sub-s. 1: "If any person lawfully sworn as a witness . . . in a judicial proceeding wilfully makes a statement material in that proceeding, which he knows to be false . . . he shall be guilty of perjury . . ."

Sub-s. 2: "The expression 'judicial proceeding' includes a proceeding before any court, tribunal, or person having by law power to hear, receive, and examine evidence on oath."

Income Tax Act, 1918, s. 137, sub-s. 4: "If, on an appeal, it appears to the majority of the commissioners present at the hearing, by examination of the

"appellant on oath or affirmation, or by other lawful evidence, that the appellant is overcharged by any assessment or surcharge, the commissioners shall abate or reduce the assessment or surcharge accordingly, but otherwise every such assessment or surcharge shall stand good."

Section 230, sub-s. 2: "Anything required under this Act to be done by the general commissioners, the additional commissioners, the special commissioners, or any other commissioners, may save as otherwise expressly provided by this Act, be done by any two or more commissioners."

and it necessarily follows that the minimum number requisite to constitute an appeal tribunal must be three. The appellant's conviction was, therefore, bad.

Sir David Maxwell Fyfe S.-G. and L. A. Byrne for the Crown were not called on to argue this point.

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The judgment of the court (CHARLES, TUCKER and CROOM-JOHNSON JJ.) was delivered by CROOM-JOHNSON J., who summarized the facts and contentions, and continued: The first point taken by the appellant against his conviction was that the oath which he took and the evidence which he gave was not taken or given before a judicial tribunal because, he argues, not less than three Special Commissioners are requisite to form an appeal tribunal under the Income Tax Acts and, there having been only two commissioners sitting in the present case, the proceedings were a nullity. Sect. 230 of the Income Tax Act, 1918, provides that anything required to be done under the Act by commissioners "may, save as otherwise expressly provided by this Act, be done by any two or more commissioners." It was admitted on behalf of the appellant that there is no express provision in the Act to the contrary, but he prays in aid s. 137, sub-s. 4, which refers to a "majority of the commissioners," and contends that there cannot be a majority out of two, and, accordingly, that, reading the two sections together, the express language of s. 230, which is "two or more commissioners," must be read as "not less than three" in the case of an appeal.

Sect. 137, sub-s. 4, of the Act, in our opinion, is inserted for the benefit of the taxpayer to show that the determination of a majority of the commissioners in his favour, in cases where a majority is possible, will suffice, and we find it impossible to read the implication which the appellant contends arises out of s. 137, sub-s. 4, as an express provision within the meaning of s. 230. We can see nothing repugnant to s. 230 in s. 137 and no inconsistency between the two sections. If there were anything inconsistent in them it would be the earlier section which would be impliedly repealed or would have to give way to the later.

No authority was cited to us in support of the contention put forward. In our experience it has been the routine practice for many years past for two Special Commissioners to constitute an income tax tribunal appeal. In view of the critical, and, indeed, meticulous, examination which the provisions of the

C. C. A. Income Tax Acts have received at all hands, at least since the year 1918, it is curious, to say the least of it, if the point is a good one, that no trace can be found in the mass of authorities reported in the Tax Cases of any case in which the issue of the legality of the practice has been raised. If the point is a good one, none of the hearings before a tribunal of two Special Commissioners and none of the determinations on cases stated by a tribunal so constituted, was valid or effective for any purpose. In our opinion the appeal on this point fails.

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[CROOM-JOHNSON J. dealt with the other grounds of appeal and said that the appeal against conviction must be dismissed.]

Appeal dismissed.

Solicitors for appellant : *Denton, Hall & Burgin.*

Solicitor for Crown : *Solicitor for Inland Revenue.*

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Apr. 14.

Criminal law—Larceny—Animus furandi—Cheque contained in envelope—Intent to steal formed when envelope opened.

The appellant received a letter which was intended for someone else. He kept it for some days, and then, on opening it, he found inside a cheque, inadvertently made out in his name, which he thereupon appropriated to his own use :—

Held, that, although, when the letter was delivered to the appellant, he had no animus furandi with regard to the contents, he was properly convicted of larceny.

Rex v. Mucklow (1827) 1 Mood. C. C. 160 and *Reg. v. Davies* (1856) Dear. C. C. 640 not followed. *Reg. v. Ashwell* (1885) 16 Q. B. D. 190 applied.

APPEAL against conviction.

On June 20, 1942, one Lewis Hutson of 96, Scotter Road, Scunthorpe, Lincolnshire, sold three pigs to the Ministry of Food. On July 4 a cheque for 23*l.* 2*s.* 7*d.* in payment for the pigs was made out by the ministry, but inadvertently the name of the payee was typewritten as "Mr. Hudson." The cheque, enclosed in an envelope, was delivered to the appellant, James Hudson, who lived at North Farm, Scunthorpe. There was no evidence when the appellant opened the letter, but on July 11 he returned the cheque to the ministry accompanied by a letter in the following terms : "Mr. J. Hudson, Scotter

"Rd., Scunthorpe. Dear Sir, just a line to tell you that I "have received a cheque from the Ministry of Food and there "was no initial on it, so I have sent it back to you. My name "is Mr. J. Hudson. Yours truly, J. Hudson." On July 14, the ministry returned the cheque to the appellant with the initial "J" inserted in ink. On July 17 the appellant opened a banking account by paying in the cheque, which was endorsed "J. Hudson," and subsequently he operated the account. The appellant having been indicted before Lewis J., at Lincolnshire Assizes for larceny of the cheque, at the close of the case for the prosecution it was submitted on his behalf that there was no case to go to the jury on the ground that the appellant had no animus furandi at the time when he received the letter containing the cheque. Lewis J. overruled the submission and left the case to the jury, who convicted the appellant.

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Elborne for appellant. The judge was wrong in leaving the case to the jury. *Rex v. Mucklow* (1) and *Reg. v. Davies* (2) are authorities for the proposition that where a person receives a letter and has no animus furandi at the time of doing so he cannot be convicted of larceny if he subsequently appropriates the contents of the letter. The authority of those cases still stands.

Fitzwalter Butler for the Crown. The judge was right in leaving the case to the jury. The appellant did not receive the cheque until he opened the envelope and found that there was a cheque inside. *Rex v. Mucklow* (1) and *Reg. v. Davies* (2) can no longer be regarded as law since *Reg. v. Ashwell* (3): see, particularly, the judgments of Lord Coleridge C.J. and Cave J. In that case the conviction was affirmed although the facts were far more favourable to the defence than are those in the present case for there the prosecutor intended to hand to the prisoner the actual coin he had in his hand, whereas in the present case the Ministry of Food did not intend to hand anything to the appellant. The judges who held that the conviction in *Reg. v. Ashwell* (3) should be quashed seem to have so decided on the ground that the prosecutor intended to hand to the prisoner the particular coin which in fact he gave him.

The judgment of the court (CHARLES, TUCKER and CROOM-JOHNSON JJ.) was delivered by CHARLES J. The question which

(1) (1827) 1 Mood. C. C. 160, 161. (3) (1885) 16 Q. B. D. 190.

(2) (1856) Dear. C. C. 640.

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we have to determine is whether or not it was established in law that the appellant was guilty of larceny. At first sight that question would appear to be complicated by the fact that there are decisions on the point which are in disagreement with each other. The appellant relied on *Rex v. Mucklow* (1) and *Reg. v. Davies* (2), in which it was decided—on what grounds it is not clear since the reports are somewhat scanty—that a man who took a letter supposing it to belong to him and, on finding that it did not, appropriated to himself property which it contained, was not guilty of larceny, there being no animus furandi when he first received the letter. Those old cases were exhaustively considered by the Court for Crown Cases Reserved in *Reg. v. Ashwell* (3), which was heard by fourteen judges, seven of whom were of opinion that the prisoner had been guilty of larceny at common law and seven that he had not. The jury had convicted the appellant, and the court being equally divided, the conviction stood. The facts there were that the prisoner asked the prosecutor for the loan of a shilling. The prosecutor gave him a sovereign believing it to be a shilling, and the prisoner took it under the same belief. Some time afterwards the prisoner discovered that the coin was a sovereign, and then and there he fraudulently appropriated it to his own use. There are observations in the judgments which give useful guidance as to the attitude which should be adopted by the court in the present appeal. Cave J. said (4) “In *Reg. v. Middleton* (5), in which it was held by eleven judges “against four that, where there was a delivery of money under “a mistake to the prisoner, who received it animus furandi, “he was guilty of larceny, there occurs a passage in the “judgment of some of the judges who formed the majority “which is as follows: ‘We admit that the case is un- “distinguishable from the one supposed in the argument, “of a person handing to a cabman a sovereign by mistake “for a shilling; but after carefully weighing the opinions “to the contrary, we are decidedly of opinion that the “property in the sovereign would not vest in the cabman, “and that the question whether the cabman was guilty of “larceny or not, would depend upon this, whether he, at the “time he took the sovereign, was aware of the mistake, and “had then the guilty intent, the animus furandi.’ For my

(1) 1 Mood. C. C. 160, 161.

(4) 16 Q. B. D. 202, 216, 225.

(2) Dear. C. C. 640.

(5) (1873) L. R. 2 C. C. R. 38.

(3) 16 Q. B. D. 190.

"part I am quite unable to reconcile the cases of *Rex v. Mucklow* (1) and *Reg. v. Davies* (2) and the passage I have cited from *Reg. v. Middleton* (3) with those of *Cartwright v. Green* (4), and *Merry v. Green* (5); and being compelled to choose between them, I am of opinion that the law is correctly laid down in *Merry v. Green* (5) for the following reasons. The acceptance by the receiver of a pure benefit unmixed with responsibility may fairly be, and is in fact presumed in law until the contrary is shewn; but the acceptance of something which is of doubtful benefit should not be and is not presumed. Possession unaccompanied with ownership is of doubtful benefit; for although certain rights are attached to the possession of a chattel, they are accompanied also by liabilities towards the absolute owner which may make the possession more of a burden than a benefit. In my judgment a man cannot be presumed to assent to the possession of a chattel; actual consent must be shewn. Now a man does not consent to that of which he is wholly ignorant; and I think, therefore, it was rightly decided that the defendant in *Merry v. Green* (5) was not in possession of the purse and money until he knew of their existence." Stephen J. said: "If a man picks up a purse containing money some seconds must usually pass before he can open the purse and discover and determine to appropriate the money. I think, however, that for legal purposes it is neither possible nor desirable to attempt to go into such a refinement as this. If a man finds a purse, picks it up, opens it, finds money in it, and thereupon determines to keep it for himself, it appears to me that the whole process ought to be regarded as one action, taking place at one time, as for many purposes the fractional parts of a day are not regarded by the law. If the examination were delayed for a substantial time, I think the question for the jury would be whether at the time of the taking the prisoner intended to keep what he found, conditionally upon its turning out upon examination to be worth his while to do so, and whether at the time of taking the goods he had the means of knowing the owner."

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The words of Stephen J. really go to the heart of this matter. The appellant received an envelope. What he did with it for some days was not disclosed by the evidence. Eventually he

(1) 1 Mood. C. C. 161.

(4) 8 Ves. 405.

(2) Dear. C. C. 640.

(5) (1841) 7 M. & W. 623.

(3) L. R. 2 C. C. R. 38.

C. C. A. opened the envelope and he discovered the cheque, a thing which was palpably valuable and which equally palpably belonged to someone else. At that moment, for the first time, he was in a position—in which he had not been before—to form an intent. In effect, he said then and there: "I am going to appropriate and take away from the owner property which he does not intend to give me and which I do not intend to return to him, but of which I do intend permanently to deprive him." That appears to me to come within the words of Lord Coleridge C.J. in *Reg. v. Ashwell* (1) where he says: "In good sense it seems to me he did not take it till he knew what he had got; and when he knew what he had got, that same instant he stole it." That is what the appellant did in this case. As soon as he saw what he had got, he made up his mind to steal it. He then did all that was necessary for him to complete the offence of larceny. The result is that he was properly convicted, and the appeal must be dismissed.

Appeal dismissed.

Solicitor for appellant: *Registrar of the Court of Criminal Appeal.*

Solicitor for the Crown: *Director of Public Prosecutions.*

(1) 16 Q. B. D. 190, 225.

P. B. D.

1943

Apr. 15.

HODGE v. ULTRA ELECTRIC, LIMITED.

Emergency legislation — Control of employment — Essential work — Termination of employment—Reinstatement—Payment of wages to, but no work required of, employee—No work available—Essential Work (General Provisions) Order, 1942 (St. R. & O., 1942, No. 371, art. 5 (3.).

The respondents, who carried on an undertaking scheduled by the Minister of Labour and National Service under the provisions of the Essential Work (General Provisions) Order, 1942, applied to the national service officer, in pursuance of art. 4 (1.) (a) of the order, for permission to terminate the employment of one B. on the ground of redundancy, there being no work for her. Permission was given, but, subsequently, following a recommendation of the local appeal board, the national service officer revoked the permission he had given for the termination of B.'s employment and issued a direction to the respondents under art. 5 (3.) of the

order for the reinstatement of B. in their employment as from a specified day. On the day in question B. duly attended at the respondent's premises to work, but she was told by the respondents' representative, as the fact was, that there was no work available for her. She was not allowed on the respondents' premises, but was paid her wages. Thereafter, she attended from time to time, but was never admitted to the premises or allowed to do any work :—

Held, that, as the respondents had done everything possible to put B. back in the same position in their employment as that which she had occupied before her dismissal, the fact that they had failed to provide work for her when no suitable work was available, did not constitute a failure on their part to comply with the direction for her reinstatement.

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CASE stated by justices.

An information was preferred by the appellant, Frederick Harry Hodge, an officer of the Ministry of Labour and National Service, under reg. 58A of the Defence (General) Regulations, 1939, and the Essential Work (General Provisions) Order, 1942, made thereunder, against the respondents, Ultra Electric, Ltd., for that they, being a person scheduled under the order, did on or about August 10, 1942, fail to comply with a direction given by a national service officer to reinstate in their employment one Dorothy Birch, a specified person within the meaning of the order, who had been dismissed, power to dismiss the said Dorothy Birch having been cancelled by the national service officer.

The respondents carried on an undertaking which at the material time was scheduled by the Minister of Labour and National Service under the Essential Work (General Provisions) Order, 1942, in respect of all persons employed therein. On March 30, 1942, Dorothy Birch was employed by the respondents in their undertaking as a viewer. On May 18, 1942, the respondents applied to the national service officer for permission to terminate the employment of seven persons, including Mrs. Birch, on the ground of redundancy, the respondents having no work for them. On June 11, 1942, permission to terminate the employment of the persons concerned was given by a national service officer. On June 16, 1942, Mrs. Birch, pursuant to art. 5 (1.) of the order, requested the national service officer in writing to submit the matter of the termination of her employment to a local appeal board. On July 20, 1942, the matter was heard by the board who made a recommendation to the national service officer. Pursuant to art. 5 (3.) of the

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order, the national service officer considered the recommendation and, on August 1, 1942, he issued a written direction to the respondents to reinstate Mrs. Birch in their employment as from and including August 10, 1942. On that day Mrs. Birch attended at the respondents' premises to work. There was, in fact, no work available for her to do. She was so informed by the respondents' personnel manager who told her that she would receive her wages, but refused to admit her to the premises. Thereafter, Mrs. Birch attended from time to time, but the respondents never admitted her to the premises or allowed her to do any work, there being no work available for which she was suitable. From August 10, 1942, onwards, the respondents paid to Mrs. Birch every week the sum of 2*l.* 12*s.* 3*d.* which was calculated on the basis of a full fifty-five-hour working week.

The justices were of opinion that the respondents had reinstated Mrs. Birch in their employment, and, she having suffered no financial loss, that the respondents had complied with the direction of the national service officer, and they dismissed the information. The appellant appealed.

Sir David Maxwell Fyfe S.-G. and *Arthian Davies* for the appellant. The justices were wrong in holding that the employee had been reinstated within the meaning of art. 5 (3.) of the order. The natural and prima facie meaning of the word "reinstate" as applied to a person who has been dismissed is to replace him in the position from which he was dismissed in such a way as fully to restore the status quo ante the dismissal. The word in the order connotes the right to work as well as the right to receive money. Readiness and willingness on the part of the employer to provide work is not sufficient. It must be provided. Apart from the order, an obligation to provide work may be implied from the terms of the contract between the parties, and should be so implied in the present case: see *Turner v. Sawdon & Co.* (1); *Herbert Clayton & Jack Waller, Ltd. v. Oliver* (2); *Whittle v. Frankland* (3).

Valentine Holmes for the respondents. The word "employment" is used in two senses, first, strictly, in the sense of the relationship between master and servant, and, secondly, colloquially, in the sense of the word "work." Strictly,

(1) [1901] 2 K. B. 653.

(3) (1862) 2 B. & S. 49.

(2) [1930] A. C. 209.

"work" defines the particular nature of the service rendered to the employer. Throughout this order the distinction is carefully maintained, "employment" being invariably used in the sense of the relationship between the parties, while "work" is confined to the work which the employee does. In the present case Mrs. Birch was reinstated so far as her relationship with the respondents was concerned. She was, therefore, reinstated within the meaning of the order. There being no work for Mrs. Birch to do, the respondents did everything possible to reinstate her by taking her back into their service and giving her every right she was entitled to under her contract or under the terms of the order. Apart from the order the respondents were under no obligation to give her work: see *Turner v. Sawdon & Co.* (1); *Lagerwall v. Wilkinson, Henderson & Clarke, Ltd.* (2).

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CHARLES J. The respondents did not exhibit any desire to evade their responsibilities or in any way to flout or disregard the direction given lawfully by the national service officer under the Essential Work (General Provisions) Order, 1942. They took Mrs. Birch back into their service. They put her again on the pay-roll at the same rate of wages. They paid her those wages. They insured her under the National Health Insurance Act, and they treated her in every way as she had been treated before, that is to say, as an employee in their service, save only, that they gave her no work. The reason for that, as the justices have found as a fact, was that, when she attended at the respondents' premises on August 10, there was no work available for her to do. It appears to me that in a case of this kind the word "reinstatement" connotes the putting back, so far as is possible, of the person dismissed into the same position as that which he occupied when the dismissal took place. I cannot give accord to the submission that the idea of giving work is not to receive any consideration. I think it must; because work and wages are very closely knit together under the regulations and the Essential Work Order. Equally do I feel, however, that when employers are directed to reinstate an employee and they do all that the respondents did here to put that employee back in his previous position and only fail to provide him with work because there is no work for him to do, those employers have, in fact, reinstated the employee. I, therefore, think that the justices were

(1) [1901] 2 K. B. 653.

(2) (1899) 80 L. T. 55.

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right in dismissing the information, and the appeal must be dismissed with costs.

TUCKER J. I agree. We have to determine the correct interpretation to be placed on the words "direct the re-instatement of any specified person who has been dismissed," in art. 5 (3.) of the Essential Work (General Provisions) Order. It appears to me that reinstatement involves putting the specified person back, in law and in fact, in the same position as he occupied in the undertaking before the employer terminated his employment. In my view, on the facts before them, the justices were perfectly entitled to come to the conclusion that it had not been proved to their satisfaction that there had been any failure on the part of the respondents to comply with the direction given them by the national service officer. If there had been anything in the nature of a refusal by the respondents on August 10 or thereafter to provide Mrs. Birch with suitable work when such work was available, different considerations would arise, but on the facts as stated in this case, it is impossible for us to say that the justices came to an erroneous decision in point of law.

CROOM-JOHNSON J. I agree, and for the same reasons. The duty to reinstate must be a duty to put the employee back in the same job and under the same terms and conditions. I assume that there was an obligation on the respondents to find some work for Mrs. Birch, but I cannot think that there was an obligation to find work every day or to find what was described in one of the cases to which we were referred, as continuous work. Without citing them I may refer to the observations of A. L. Smith M.R. in *Turner v. Sawdon & Co.* (1). If there were an obligation to find continuous work, an action would lie at the suit of the servant for not being given enough work or a fair share of the work. In other words, the obligation on the employer is an obligation to give work if there is work available, and not an absolute obligation to give work when there is none in fact. That being so, the word "reinstatement" not being a term of art and having no specialized meaning but being a word to be accorded its ordinary sense, I can see no trace of the justices having proceeded on any wrong basis in law in arriving at the conclusion which they reached. I desire to add one other thing,

(1) [1901] 2 K. B. 653, 656, 657.

which is perhaps a little outside my function, but I cannot pass from the case without referring to it. In *George v. Mitchell* (1), MacKinnon L.J. called attention to the effect on industry of the Essential Work (General Provisions) Order, 1942. I desire to emphasize what he there said, because the urgent need for labour at the present time leads me to think that, when applications are made by employers to discharge work-people on the ground that they have no work for them to do, in the words of MacKinnon L.J., presumably the employers know their own business, and, therefore, the most careful and cautious consideration should be given to the question before they are compelled to retain in their service people whom they feel they cannot usefully employ in the national effort.

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Appeal dismissed.

Solicitor for appellant: *Solicitor to Ministry of Labour.*

Solicitors for respondents: *Herbert Baron & Co.*

(1) [1943] 1 All E. R. 233, 238.

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J. & J. MAKIN, LIMITED v. LONDON AND NORTH
EASTERN RAILWAY COMPANY.

C. A.

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Apr. 15, 16.

*Flood—Damage—Canal—Statutory powers—Liability of proprietors—
“Accident”—Act of God—Peak Forest Canal Act, 1794 (34 Geo. 3,
c. xxvi.), s. 15.*

The Peak Forest Canal Act, 1794, empowered a company of proprietors, of whom the defendant railway were the successors in title, to construct a canal. Sect. 15 provided: “If any injury
“or damage shall happen to be done to the owner or occupier of
“any mill, edifice, lands or hereditaments, by the breach of any
“reservoir to be made for the purpose of the said intended canal
“or cut, or any of the locks or works of the said navigation, or
“by the water flowing from the said canal or cut, or any such
“reservoir, or from any other accident, then, and in every such
“case, full compensation shall be made to the owner and occupier
“of, and all other persons interested in, any such mill, edifice,
“land or hereditaments by the said company of proprietors for
“all such injury and damage”:—

Held, by the Court of Appeal, affirming Atkinson J., that this section imposed an absolute obligation on the proprietors, who were, therefore, bound to compensate the plaintiffs for damage, caused by the overflow of water when an embankment collapsed

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owing to a violent storm, even though the storm was such as to amount to an "act of God."

Hammond v. St. Pancras Vestry (1874) L. R. 9 C. P. 316; *Great Western Ry. v. Owners of s.s. Mostyn* [1928] A. C. 57; and *North-western Utilities, Ltd. v. London Guarantee and Accident Co., Ltd.* [1936] A. C. 108, distinguished.

Observations of Lord Watson in *Rothes (Countess) v. Kirkcaldy Waterworks Commissioners* (1882) 7 App. Cas. 694, 707 applied.

In ordinary language the word "accident" covers an act of God.

APPEAL from Atkinson J.

The plaintiffs, J. & J. Makin, Ltd., were the owners of a paper mill at Disley, Cheshire. The defendants, the London and North Eastern Railway Co., were the owners of the Peak Forest Canal as the successors in title of the original company of proprietors constituted by the Peak Forest Canal Act, 1794. The canal crossed a narrow valley known as Higgins Clough on an embankment about sixty feet high, and a stream ran down the Clough and passed through the embankment by means of a culvert whence it flowed towards the plaintiffs' mill. On June 22, 1941, during a storm the embankment collapsed and a great quantity of water escaped from the canal into the stream and carried a large amount of stones and debris on to the plaintiffs' property. The plaintiffs issued a writ claiming a declaration that the defendants were liable to pay compensation to the plaintiffs under the Peak Forest Canal Act, 1794, or, alternatively, damages for breach of statutory duty. By order of the master a special case was stated for the determination of the question: "Does the said Act of 1794 impose a liability on the defendants in respect of the escape of water causing damage to the plaintiffs' property notwithstanding such escape of water be caused by an act of God?" Atkinson J. held that the section imposed an absolute obligation on the defendants, who appealed.

Tucker K.C., *Sellers K.C.* and *Horniman* for the defendants. Although s. 15 of the Act of 1794 appears to impose an absolute obligation on the canal owners, they are not liable if the collapse of the bank was due to an act of God. Even if the section on its true construction were absolute, no greater liability would be imposed by it than under the rule in *Rylands v. Fletcher* (1), from which liability damage caused by an act of God or the malicious act of a third person is excluded:

(1) (1868) L. R. 3 H. L. 330.

Rickards v. Lothian (1) ; *Northwestern Utilities, Ltd. v. London Guarantee and Accident Co.* (2). See also *Hammond v. St. Pancras Vestry* (3) and *Stretton's Derby Brewery Co. v. Mayor of Derby* (4). The plaintiffs below relied on the very difficult case of *River Wear Commissioners v. Adamson* (5), which was considered in *Great Western Ry. v. Owners of s.s. Mostyn* (6). The liability imposed on the defendants by s. 15 of the Peak Forest Canal Act, 1794, is limited. The words "from any other accident" in the section show that the whole section is concerned only with compensation for an "accident." As to the meaning of "accident," if the canal bank had been struck by lightning and damage resulted, that damage would be caused, not by the canal, but by the lightning, and that would not be an "accident" within s. 15. Neither would it be an "accident" if the canal were deliberately destroyed by enemy action. The duty of the owner is only to make the canal reasonably safe. That view is supported by *Nichols v. Marsland* (7). The real effect of s. 15 is to put back the full *Rylands v. Fletcher* (8) liability.

[GODDARD L.J. referred to *Rothés (Countess) v. Kirkcaldy Waterworks Commissioners* (9).]

Wynn-Parry K.C. and *Scott Cairns* (for *J. P. Ashworth*, on war service) for the plaintiffs. One cannot quarrel with the general propositions, (1.) that the question whether s. 15 imposed an absolute obligation on the defendants is one of pure construction ; (2.) that that liability must be imposed in clear terms ; (3.) that, if the section is ambiguous, the less onerous construction is to be preferred. The section clearly sets out to impose a liability. This maxim should be borne in mind from *Nichols v. Marsland* (7) : "When a party by his own contract creates a duty, he is bound to make it good notwithstanding any accident by inevitable necessity." In the court below the plaintiffs cited *River Wear Commissioners v. Adamson* (5) and *Great Western Ry. v. Owners of s.s. Mostyn* (6) not only in order to distinguish them from the present case so far as the decisions are concerned, but to rely on the principles laid down in them. As to the construction

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(1) [1913] A. C. 263.

(6) [1928] A. C. 57.

(2) [1936] A. C. 108, 118, 120,

(7) (1875) L. R. 10 Ex. 255 ;

121.

in C. A. (1876) 2 Ex. D. 1.

(3) (1874) L. R. 9 C. P. 316.

(8) L. R. 3 H. L. 330.

(4) [1894] 1 Ch. 431.

(9) (1882) 7 App. Cas. 694.

(5) (1877) 2 App. Cas. 743.

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of s. 15, far from the words "or by other accident" cutting down the previous words, they are inserted to gather in anything not provided for by the previous words of the same nature as the things enumerated. The words are wide enough to cover intentional or negligent breach of the canal banks by the proprietors themselves, giving in that case a concurrent right to compensation under the Act with the common law right of action. The Act deals with events, not with the causes of the events.

Tucker K.C. replied.

LORD GREENE M.R. We are to assume that the storm which caused the flooding of the plaintiffs' premises was such as to bring it within the category of an act of God, that is to say, it was so unprecedented and unexpected that human agency would not reasonably anticipate it or be bound to take any steps to meet it. In my opinion, the appeal fails by reason of the terms of s. 15 of the Act of 1794. Apart from this section, the position of the defendants in bringing on their land an accumulation of water would have been that, as they did so under statutory powers, they could avoid the ordinary liability based on what is commonly called the rule in *Rylands v. Fletcher* (1) if they could show that the water had escaped without negligence on their part. They would not, any more than a private individual, be liable if water escaped through an act of God, the intentional act of some third party, or an act of the King's enemies. It is argued by Mr. Tucker, on behalf of the defendants, that the effect of the section is merely to deprive the defendants of the right to repel an action based on the principle of *Rylands v. Fletcher* (1) by proving absence of negligence on their part. In other words, he says, the section puts the defendants in precisely the same position as that in which a private individual would have been, i.e., subject to the full rigour of the principle in *Rylands v. Fletcher* (1) but entitled to rely on the exceptions to that rule which I have stated.

Mr. Tucker cites in support of that proposition several well-known cases. The first is *Hammond v. St. Pancras Vestry* (2). In that case s. 72 of the Metropolis Local Management Act, 1855, imposed on the vestry the duty of causing the sewers vested in them to be constructed, covered and kept so as not to be a nuisance or injurious to health,

(1) L. R. 3 H. L. 330.

(2) L. R. 9 C. P. 316.

and to be properly cleared, cleansed and emptied. An old drain, the existence of which was unknown to the vestry, had become choked. No negligence was charged by the plaintiff, and the question was debated whether s. 72 imposed an absolute duty—I am quoting the language of Brett J.—“to guarantee that the sewers shall be at all times kept ‘cleansed’”(1). If that was what the section meant, that obligation had not been performed, but the court without difficulty came to the conclusion that the obligation was not of that absolute character. Brett J. made some observations of a general nature, such as this (1): “It would seem to me to be ‘contrary to natural justice to say that Parliament intended ‘to impose upon a public body a liability for a thing which ‘no reasonable care and skill could obviate.’ Although I am prepared to be guided by the general observations in that case to the extent that I accept that an absolute liability is in a sense abhorrent, and, therefore, must be imposed by clear language, I certainly cannot read those words in their context as imposing any impediment on the court if, on the true construction of the particular section before it, it finds that the obligation imposed is absolute. Another case in which the same type of point was discussed is *Stretton’s Derby Brewery Co. v. Mayor of Derby* (2). In *Great Western Ry. v. Owners of s.s. Mostyn* (3), the House of Lords did what it had done in a previous case under the section there relevant. It struggled to find language in the section which would impose something less than an absolute liability, but, there again, the section which was being dealt with was of a very special character. It imposed an obligation, not on the proprietors of the harbour, but on third parties who might have been quite innocent. If it was read as imposing an absolute liability on such third parties, then the owner of a ship which was driven by weather out of control so that she drifted down on the company’s pier would have been liable to pay damages. The subject-matter of that section is as different from the subject-matter of the present section as anything can well be. The language, too, was different, and I cannot find in that case any assistance in the task which presents itself to this court. Before I leave the authorities I should refer to the Privy Council case of *Northwestern Utilities, Ltd. v. London Guarantee and Accident Co.* (4). There a main pipe carrying natural gas belonging

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(1) L. R. 9 C. P. 316, 322.

(2) [1894] 1 Ch. 431.

(3) [1928] A. C. 57.

(4) [1936] A. C. 108.

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to the appellants, who operated under a franchise, was broken and gas escaped owing to the operations of the local authority in the neighbourhood of the pipe. The relevance of the case for present consideration lies in the circumstance that in a general Act of the Province of Alberta which applied to the undertakers, there were two sections on which reliance was placed by the respondents to the appeal, the insurance company whose clients had been injured by the explosion. Sect. 11 provided: "The company shall make "satisfaction to the owners or proprietors of any building "or other property or to the Municipality or Minister of Public "Works as the case may be for all damages caused in or by "the execution of all or any of the said powers." Sect. 13 provided: "The company shall locate and construct its gas "or water works or electric or telephone system and all "apparatus and appurtenances thereto belonging or apper- "taining or therewith connected and wheresoever situated so "as not to endanger the public health or safety." It was argued that s. 13 covered not merely location and construction, but also maintenance. The two sections are dealt with by Lord Wright, who delivered the judgment of the Board, in two passages. He said (1): "Where undertakers are acting "under statutory powers it is a question of construction, "depending on the language of the statute, whether they are "only liable for negligence or whether they remain subject "to the strict and unqualified rule of *Rylands v. Fletcher* " (2). Lord Wright cannot have meant those to have been the only two alternatives, because obviously a section may be so drafted as to apply a stricter rule than that in *Rylands v. Fletcher* (2) and to make the obligation unqualified by any exception. He then goes on to consider the two sections to which I have referred, and says (3): "But in any case, the "question is not eventually material in this case. For, even "if the section " (scilicet s. 13) "applies to maintenance, and is "absolute in its terms, the duty it imposes is still no more than "the duty under the rule in *Rylands v. Fletcher* (2) according to "which the appellants would not be liable for damage caused, "without default on their part, by the independent act of a "third party. Then, whether or not s. 13 applies to mainten- "ance, and whether or not it imposes, where it does apply, "a liability unqualified in terms, the position is the same for

(1) [1936] A. C. 108, 120.

(3) [1936] A. C. 121.

(2) L. R. 3 H. L. 330.

"purposes of this case : the appellants' real defence was that "the damage was caused by the act of the City, for which they "were not responsible and could not control, and that they "were guilty of no negligence in the matter. That defence "could be equally good on any view of the effect of s. 13 ; "and the same reasoning applies to s. 11, if indeed that section "is open at all to the respondents in this case." Lord Wright was not there considering, and he did not have to consider, the type of question which we have to consider here.

The question which we have to determine depends entirely on the language of this section of the Act of Parliament read, as all statutes must be read, against the background of the common law. Like Atkinson J. I find nothing to shock me in the idea that in 1794 Parliament showed towards landowners a special tenderness which nowadays, perhaps, would not be found in quite the same measure. Parliament had to consider the public interest, no doubt. It had to consider the fair interests of the proprietors and the interests of those owning land in the neighbourhood of works the very nature of which would contain a threat of danger and even of catastrophe. To maintain, especially in country of this kind where aqueducts of great height are required to carry it, a large body of water the escape of which might produce a most disastrous flood, was a thing which Parliament would very carefully consider before conferring statutory powers on any company of proprietors who applied for them. This canal, as the Act recites, could not be built without the authority of Parliament, and it was open to Parliament to impose whatever terms it thought fit for the protection of landowners, and, indeed, this section is nothing more nor less than a protective section. I can find nothing unlikely in the suggestion that in 1794 Parliament decided to impose an absolute liability as a condition of the franchise it was being asked to grant.

So much for the general scope of this section and the subject-matter in relation to which it was passed. Of course, the question depends on the actual language of the section construed in relation to the general context of the Act and to the subject-matter with which it was dealing, and when I look at the language I am unable to find any justification for reading into it the sort of qualification for which Mr. Tucker contends. The injury or damage which is referred to is injury or damage done by one or other of a series of named occurrences : first,

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by the breach of any reservoir ; second, by the breach of any lock or work ; third, by the water flowing from the canal or reservoir ; fourth, from any other accident. The whole force of Mr. Tucker's argument is based on those last words, "or from any other accident." He concedes that, if it had not been for those words, it would not have been possible to read any qualification into the liability for injury caused by the breach of the reservoir or the flowing of the water, but he says that these words enable a qualification to be read in because the words "other accident" indicate that the first three occurrences are regarded by the legislature as being limited to accidental occurrences, that is to say, that we must read the section as meaning "by the accidental breach of any reservoir, by the accidental breach of any locks or works, by the accidental flowing of water from the canal or reservoir, "or from any other accident." That construction appears to me to do violence to the natural meaning of the language. The phrase "any other accident" does not seem to me to mean that the quality of being accidental must be imported into the previous incidents referred to. What it seems to me to mean is that the legislature indicates that the sort of thing it means by "accident" are things like a breach of the reservoir, breach of the locks, or the flowing of water, and, if that be right, there is no reason for limiting the liability for damage caused by a breach to the case where the breach is accidental.

Pursuing for a moment Mr. Tucker's argument, and assuming that he had made good his position so far, he says that accidental breach cannot include a breach due to an act of God, for an act of God stands in a category by itself and is not included under the word "accident." I am prepared to deal with that argument on the assumption that I am wrong in thinking that the word "accidental" ought not to be written in in the case of the three earlier sets of incidents. I then have to ask myself, when Parliament in 1794 refers to an accidental flowing of water, did it intend to exclude from that category a flowing of water caused by an event which to the ordinary person would be described as accidental, but which to the more technical mind of a lawyer might have to be put for certain purposes under the special label of "act of God"? In my opinion, that is a refinement which is not justified by anything in this section. It seems to me that, if Parliament meant damage caused by the accidental flowing of water or the accidental breach of the reservoir, those words are wide

enough in their natural meaning to cover something caused by an act of God. It is to be observed that the language here does not deal with the cause of the breach, nor does it deal with the cause of the water flowing or of the other matters. It does not appear to go behind those occurrences. In any event, in ordinary language the word "accident" seems to me without any doubt to cover an act of God. Whether the bank of the canal is broken by an ordinary or by an extraordinary flood, the sufferer has suffered damage as the result of an accident. Any such sufferer, if asked whether he had received damage as the result of an accident, would scarcely, in the latter case, say: "No, I have not suffered as the result of an accident. 'I have suffered as the result of an act of God, because this particular flood cannot properly be described as an accident.'" I do not see why a refinement of that kind should be introduced into clear and simple language of this sort. I should point out, as Atkinson J. pointed out, that the word "accident" has been considered, and its natural meaning has been described, by judicial authority on various occasions. It is not without interest to observe that in *River Wear Commissioners v. Adamson* (1) Lord Hatherley takes the very point which I have been endeavouring to explain, because he says: "I cannot concur in the views expressed in the court below 'by some of the learned judges, on the one hand that the 'damage which was done in this particular case having been 'caused by what is commonly said to be an accident, but is 'called in the language technically used in Law Courts, the 'act of God, namely, a storm, the owner of the vessel would be 'excused.'" I venture to cite that passage, not in reference to the actual decision of that case, but as indicating what to the mind of Lord Hatherley was the meaning of the word "accident" in ordinary parlance. Another citation was given by Atkinson J. from Lord Macnaghten in *Fenton v. Thorley & Co., Ltd.* (2), where he said that "'accident' is used," in the statute he was construing, "in the popular and ordinary sense 'of the word as denoting an unlooked-for mishap or an 'untoward event which is not expected or designed.'" That phraseology would quite clearly cover a breaking of a dam or the collapse of an embankment due to what is known to lawyers as an act of God. I think Atkinson J. came to a perfectly right conclusion in this case, and I would end by repeating, if I may, the great importance of construing sections of this

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kind in their context and in relation to the subject-matter without allowing oneself to be influenced by views which have been expressed on the construction of differently-worded sections applicable to different subject-matters save in so far as some general principle of construction is to be found in such authorities. I find no principle of construction which prevents me putting on this language what appears to me to be its obvious meaning.

MACKINNON L.J. I agree. In the express words of s. 15 the plaintiffs say: "Injury or damage has happened to us "by the breach of the works of the said navigation and by "water flowing from the said canal." I think those words mean what they say and cover any breach of any kind. It is sought to limit the generality of the words by reference to the ensuing words "or from any other accident." This seems to me a novel form, if not a distortion, of the old rule of ejusdem generis. That rule might be relied on to limit the generality of the words "or any other accident" by limiting them to the genus of the previously specified things or causes. In the novel or distorted form, the generality of the previously specified causes or things is sought to be limited by assimilating them to the added specified cause or thing. This process is without justification. The added words "or from any other "accident" are manifestly in amplification of the previous words and cannot be used by way of qualification or limitation of them. The truth of that last sentence may be still beyond doubt even if the previous words are incapable of amplification, for the added words may have been added from an excess of unnecessary caution. I agree that the appeal fails.

GODDARD L.J. I am of the same opinion. If authority be needed, this case is concluded by the decision of the House of Lords in *Roths (Countess) v. Kirkcaldy Waterworks Commissioners* (1), unless that case can be distinguished from the present because of the words on which Mr. Tucker has so strongly relied "or from any other accident." On that part of the case I entirely agree with what MacKinnon L.J. has just said. Those words seem to me to amplify, and not to cut down, the preceding words, though they themselves may be limited to matters ejusdem generis with those which have gone before. A section more or less in this form or to the

(1) 7 App. Cas. 694.

same effect is quite common in matters relating to water. In Michael and Will on the Law Relating to Gas and Water, 8th ed., vol. ii., pp. 26–30, will be found many instances in which Parliament has imposed terms on the undertakers of waterworks to make compensation in the most unqualified manner where banks of a reservoir burst. In fact, they are referred to as “bursting clauses”; and I notice exceptionally that in the Bury Corporation Waterworks Act, 1889, which is quoted as remarkable on account of the proviso, there is a proviso “that no obligation or liability shall attach to the corporation in respect of an injury occasioned by an actus Dei” and not arising from any default of the corporation or any “defect in the works.” From the other instances which are given it is quite clear that Parliament meant to give an unqualified right to persons who were affected by the bursting of dams or other protection to waterworks (and they do not differ in any way from a canal for this purpose) to be compensated by the undertakers if that happens. It is very natural that when water is being carried at the high level at which this water in the present case has to be carried, one should find a provision of this sort. It seems to me that we ought to construe such a section in the way that Lord Watson laid down in *Roths (Countess) v. Kirkcaldy Waterworks Commissioners* (1) namely, as if it were a contract. It is obviously put in for the protection of landowners, and I see no difference between a section inserted for the protection of a particular landowner—and there is an instance in this Act of a provision for the protection of all particular landowners, not in this respect, but in others—and a provision for the protection of a body of persons. I see that Stirling J. in *In re Manchester and Milford Ry. Co.* (2), after referring to Lord Watson’s speech in *The Countess of Roth’s* case (3), said the words mean “that for certain purposes (for example, the ascertaining the legal effect of such clauses and the nature of the rights conferred by them) enactments of this kind are to be treated as if they were contracts.” That would bring the present matter exactly within what Mellish L.J. said in *Nichols v. Marsland* (4), where he said: “When a party by his own contract creates a duty he is bound to make it good notwithstanding any accident by inevitable necessity.” The proprietors of the canal in this case, as one of the terms on which they obtained

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(1) 7 App. Cas. 694.

(2) [1897] 1 Ch. 276, 283.

(3) 7 App. Cas. 694, 707.

(4) 2 Ex. D. 1, 4.

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 1943 right to construct their canal, contracted and agreed by this
 MAKIN section to make good any damage which was caused by the
 (J. & J.), bursting of the bank of the canal. In those circumstances they
 LD. must make it good notwithstanding any accident, however
 v. inevitable. I agree also with what my Lord said with regard
 LONDON to an act of God. If a person were injured by an unprece-
 AND dented storm he could fairly and properly be said to have
 NORTH met with an accident in the storm. Every act of God which
 EASTERN causes injury may be called an accident, although not every
 RY. CO. accident is an act of God. I think that Atkinson J. came to a
 Goddard L.J. right decision.

Appeal dismissed.

Solicitors for defendants: *W. H. Hanscombe.*

Solicitors for plaintiffs: *Hall, Brydon & Chapman, for
 Grundy, Kershaw, Farrar & Co., Manchester.*

J. W. H.

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Houston Co., Ltd. [1943] K. B. 478.
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*Crown—Claim against Minister of Supply—Competence—Statutory
 power of minister to “institute and defend an action”—Action by
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 Act, 1867 (39 & 31 Vict. c. 128), s. 20.*

Where the Minister of Supply (as successor in this respect of the Secretary of State for War) brings an action of contract against a subject under s. 20 of the War Department Stores Act, 1867, the subject is entitled to prosecute a counter-claim against the minister.

Gilleghan v. Minister of Health [1932] 1 Ch. 86 overruled.

APPEAL from Viscount Caldecote C.J. in chambers.

The question raised by this appeal was whether, where the Minister of Supply brought an action on a contract made by him on behalf of the Crown with a subject, the subject could counterclaim against the minister. The minister derived his power to sue from the Ministry of Supply Act, 1939, and the Ministry of Supply (Transfer of Powers) (No.1) Order, 1939. (St. R. & O., 1939, No. 877), by virtue of which enactments his position was admittedly the same as that of the Secretary

for War under s. 20 of the War Department Stores Act, 1867 (1).

By a writ dated May 28, 1942, the Minister of Supply claimed damages for breach of contract against the defendants, British Thomson-Houston Co., Ltd. The defendants filed a defence denying liability, and counterclaimed a sum which they alleged to be due to them from the minister. The plaintiff applied to the master to strike out the counterclaim as disclosing no cause of action, because the minister had not consented to be sued. The master struck out the counterclaim, but Viscount Caldecote C.J. reversed his decision, and ordered the counterclaim to stand. He gave the minister leave to appeal.

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Devlin for the minister. The words in s. 20 "and may defend any . . . proceeding" give no right to the subject to sue the minister by writ or counterclaim. To achieve that result wider words would be required, such as "and a subject may institute and prosecute proceedings." The intention of the section is to enable the minister to be sued in a case where he has undertaken personal liability. At most it enables the minister to permit himself to be sued if he so chooses. Even if the body of the section would seem

(1) By War Department Stores Act, 1867, s. 20: "The Secretary of State for War may institute and prosecute any action, suit, or proceeding, civil or criminal, concerning military or ordnance stores . . . or any stores sold or contracted to be delivered to or by the Secretary of State for War for the use or on account of Her Majesty, or the price to be paid for the same . . . and may defend any action, suit, or proceeding concerning any such stores, matter, or thing as aforesaid; and in every such action, suit, or proceeding the Secretary of State for War may be so described without more . . . Provided always as follows: (1.) Nothing herein shall take away or abridge in or in relation to any such action, suit, or proceeding, any legal right, "privilege, or prerogative of the Crown; and in all such actions, suits, and proceedings, and in all matters and proceedings connected therewith, the Secretary of State for War may exercise and enjoy all such rights, privileges, and prerogatives as are for the time being exercised and enjoyed in any proceeding in any court of law or equity by the Crown, as if the Crown were actually a party to such action, suit, or proceeding": (2.) "It shall be lawful for Her Majesty, if and when it seems fit, to proceed by information in the Court of Exchequer, or by any other Crown process, legal or equitable, in any case in which it would have been competent for Her Majesty so to proceed if no provisions respecting procedure had been inserted in this Act."

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to give the defendants a right to sue or counterclaim, the proviso makes it clear that the minister is no more liable to be proceeded against by counterclaim than the Crown, and, even if an action would lie against the minister, it does not follow that a counterclaim would lie. Authorities dealing with provisions of the same kind are *Williams v. Lords Commissioners of Admiralty* (1) (where a cause of action was assumed and the only question considered was whether the form of suit was right. If that case be an authority for the defendants, it is wrong, and should be overruled); *Kynoch, Ltd. v. Secretary of State for War* (2) referred to in Robertson's Civil Proceedings by or against the Crown, p. 32; *The Admiralty v. Baird Bros.* (3) where, however, the material statute which seems to be Admiralty Suits Act, 1868, s. 3, does not contain the words "and may defend"; and *Rowland v. Air Council* (4) where Russell J.'s judgment assists the present appeal. The Air Council were by their statutes given a right to sue or be sued, and yet it was held that the action could not be maintained: see also *Rowland and Mackenzie-Kennedy v. Air Council* (5) where Bankes L.J. agreed with Russell J.'s view of the law and *Gilleghan v. Minister of Health* (6).

Valentine Holmes for the defendants. The first of the alternative meanings which the minister has sought to put on this section—that it merely gave a right to sue and defend if the minister has undertaken some personal liability—is untenable. It is inconceivable that Parliament would insert a section to deal with such a position. A Secretary of State never does make a contract under which he is personally liable, but, if he did, there was no need for legislation for he could be sued in his personal capacity. The second argument, that the section gave the Secretary of State a right to decide whether he would defend or not, is even more hopeless. In certain contexts "may defend" might mean "may defend if he likes," but not here. In *Williams v. Lords Commissioners of Admiralty* (7), Jervis C.J. read "may sue or defend" as meaning the same as "may sue or be sued." [He referred to *Rowland v. Air Council* (8); *Rowland and Mackenzie-*

(1) (1851) 11 C. B. 420.

(6) [1932] 1 Ch. 86, 92.

(2) (1907) Unrep.

(7) 11 C. B. 420, 430.

(3) (1921) 8 Ll. L. Rep. 69.

(8) [1923] W. N. 64; 39 Times

(4) (1923) 39 Times L. R. 228.

L. R. 228; in C. A. at 455.

(5) (1927) 96 L. J. (Ch.) 470, 472.

Kennedy v. Air Council (1); *Hosier Bros. v. Derby (Earl)* (2); *Gilleghan v. Minister of Health* (3)]. Since the court was only concerned with the words of the particular section those authorities were not directly in point, and if necessary he would ask the court to overrule *Gilleghan v. Minister of Health* (3). [He was not called on to argue the point that a counterclaim is a "proceeding."]

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Devlin in reply. The reason why the Crown could not be counter-claimed against is that a counterclaim is the creation of statute and statutory rules and it is part of the prerogative of the Crown not to be bound by statutes unless expressly named.

Cur. adv. vult.

Apr. 19. LORD GREENE M.R. I have read the judgments which are about to be delivered by my learned brethren and I agree with them.

MACKINNON L.J. read the following judgment. This is an appeal by the minister from a decision in chambers of the Lord Chief Justice, who reversed a master's order striking out the defendants' counterclaim. The minister, by a writ dated May 28, 1942, sued the defendants. By his statement of claim he alleged that he made a contract of purchase from the defendants, and claimed damages for its breach by them. The defendants by their defence admitted the contract, denied the breach, and by way of counterclaim asked for damages for an alleged breach by the minister. The monetary amount of their claim was only 68*l.* 12*s.* On October 19, 1942, the minister took out a summons before a master in chambers applying "for an order that the counterclaim of the defendants "in this action be struck out as disclosing no cause of action." No affidavit was filed in support of this application. The summons, in its terms, would seem to be doomed to failure, for on the law relating to sale of goods the defendants' counterclaim manifestly did disclose a cause of action. The minister, however, was able to ask the master to take judicial notice of the fact that he was a minister of the Crown. His contract with the defendants was made as a minister of the Crown on behalf of His Majesty. He, therefore, relied on the well-known

(1) (1925) 41 Times L. R. 545;
(1927) 96 L. J. (Ch.) 470, and (a
separate appeal) [1927] 2 K. B. 517.

(2) [1918] 2 K. B. 671.

(3) [1932] 1 Ch. 86.

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principle of the common law that a minister or other servant of the Crown, having made such a contract, cannot be sued on it either personally or in the name of his office. For this reason the minister alleged that the defendants could not pursue their counterclaim. Logically, the defendants' reply was that this rule of the common law lays down not only that a minister cannot be sued on such a contract but also that he cannot sue on it. If, therefore, the rule were invoked it operated to show that the minister's claim disclosed no better cause of action than the defendants' counterclaim. Therefore, if the counterclaim must be struck out so must the claim.

[To this contention the minister's reply is that, in variation of the common law rule, a statute has given him the right to sue on the contract, and, therefore, no objection can be taken to the claim. To which the defendants in effect reply: "It is true that there is a statute which gives you such a right to sue, but that same statute makes you equally liable to be sued. Therefore, you cannot object to our counterclaim." The only question we have to consider is whether this last contention of the defendants is correct.

The statute in question is the War Department Stores Act, 1867, which is made to apply to the minister by virtue of the Ministry of Supply Act, 1939, and the Ministry of Supply (Transfer of Powers) No. 1 Order, 1939, so that the minister's position is assimilated to that of the Secretary for War under the Act of 1867. On the construction of s. 20 of the Act of 1867, if I were unassisted by any authorities or not embarrassed by them, I should be of opinion that it does empower the defendants to sue the minister on this contract, and, therefore, that their counterclaim ought not to be struck out. It is true that the section does not use the plainer words "may sue and be sued" which appear in some similar enactments, but the words "may institute and prosecute any action . . . and may defend any action, suit, or proceeding" seem to me to involve the clear implication that such "action, suit or proceeding" may be brought against the minister by the other party to the contract. Unless it can be so brought there is nothing which he "may defend." Nor can I agree with the suggestion that the provision that "he may defend" an action brought against him must be read subject to the implication "unless he elects to rely on the common law rule that the action cannot be brought against him." If Parliament had meant to make such a qualification, it could and

would have expressed it. I cannot think that it ought to be implied. Nor do I think that the proviso, saving the rights and privileges of the Crown, and giving the minister such rights and privileges, preserves the common law right of the minister to object to an action being brought against him, for the proviso speaks of the minister enjoying "all such rights, "privileges, and prerogatives . . . as if the Crown were actually "a party to such action." That clearly has in view the rights of the Crown in the course and conduct of the action (e.g. as to discovery). It cannot refer to a right to put an end to the action under a rule of the common law. In the result, I think, unless there are authorities which constrain me to a contrary view, that the decision of the Lord Chief Justice was correct, and this appeal fails, but it remains to consider the cases that were cited to us.

The earliest is *Williams v. Lords Commissioners of Admiralty* (1). By 1 & 2 Geo. 4, c. 93, s. 9, the Commissioners "are authorized . . . to bring any action" (of a particular sort) ". . . and also . . . to defend any action" (of the like sort). The plaintiff sued the Commissioners. On a rule nisi to show cause why his action should not be set aside for irregularity the court refused to make any order. Jervis C.J. said in terms that the defendants "may sue and be sued in an action "of debt," and the other three members of the court agreed with him. It was manifest from the writ that the action was not one of those authorized, but the court would not set it aside on that ground which they thought must be left for the trial. This is significant of the extreme technicality of procedure as late as 1851. If the present application to set aside the writ "as disclosing no cause of action" had been made, it would have had short shrift in the time of Jervis C.J. This case is a clear authority in support of the defendants, and of the view I have expressed. Mr. Devlin had to ask us to overrule it. In *Hosier Bros. v. Derby (Earl)* (2) an action was brought against the earl who was Secretary for War when the writ was issued, but not when the contract relied on was made. The Court of Appeal stayed the action. In argument there was a suggestion that the suit might be properly brought under the War Department Stores Act, 1867, and counsel for the plaintiffs asked leave to amend by framing his action thereunder. Swinfen Eady M.R. as to this said: "The present "action is not brought under that statute; it is not brought

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(1) 11 C. B. 420.

(2) [1918] 2 K. B. 671, 675.

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"against the Secretary of State for War for the time being as such ; it is brought against a named defendant, Lord Derby." He refused the application to amend, and expressed no opinion as to the result if the claim had been made under the statute of 1867. Scrutton and Duke L.JJ. merely expressed their concurrence. The case known as *The Admiralty v. Baird* (1) is obscure. The court allowed an appeal from Bailhache J. and stayed a counterclaim. Bankes L.J. is reported as saying : "The commissioners have certain rights by statute "to bring action and to defend an action, but there is no suggestion in this statute that anybody has any right to bring an "action or counterclaim against the commissioners." What was the statute in question is not indicated, nor can I understand how the commissioners could defend an action unless an action was and could be brought against them. Further, no one appears to have referred to *Williams v. Lords Commissioners of Admiralty* (2) decided by the full Court of Common Pleas as long ago as 1851.

We were then referred to a number of cases arising out of the inventive activities of a Mr. Mackenzie-Kennedy. In *Rowland v. Air Council* (3), his trustee in bankruptcy sued. The statute there involved was the Air Force (Constitution) Act, 1917, in which s. 10, sub-s. 1, reads : "The Air Council "may sue and be sued, and may for all purposes be described, "by that name." These words, "the Air Council may sue and "be sued " appear to me to be perfectly explicit, and to mean what they say. That the council "may be sued " can only mean one thing, and is much clearer than the words "may "sue and may defend " in the earlier cases. None the less, it was held by Russell J. that the plaintiff's action must be stayed, and he dismissed the action. This decision was followed by P. O. Lawrence J. in *Rowland and Mackenzie-Kennedy v. Air Council* (4). It was again followed by Farwell J. in *Gilleghan v. Minister of Health* (5). The relevant statute there enacted that the minister "may sue and be sued "by the name of the Minister of Health." Farwell J. says (6) that the matter has been considered and decided. "Russell J., "Lawrence J. and the Court of Appeal all held that a provision "of that sort did not . . . entitle a subject to sue the

(1) 8 Ll. L. Rep. 69.

(2) 11 C. B. 420.

(3) [1923] W. N. 64 ; 39 Times
L. R. 228 ; in C. A. at p. 455.

(4) 41 T. L. R. 545.

(5) [1932] 1 Ch. 86.

(6) Ibid. 92.

"minister." If the Court of Appeal has so decided, it may be that I am bound to follow that decision. It is, therefore, necessary to consider the cases in which Rowland and Kennedy appeared in this court. The first of those occasions was April 24, 1923, when the above-mentioned judgment of Russell J. was set aside: *Rowland v. Air Council* (1). The court declined to express any opinion whether the view of Russell J. was right, set aside his order dismissing the action, and ordered it to come on for hearing on the question of liability alone. On June 20 and 21, 1927, three appeals appear to have been heard (2). The first was an appeal from P. O. Lawrence J. Apparently, this was the same action (1) in which the Court of Appeal had set aside the judgment of Russell J. and ordered the action to be heard, and Lawrence J. had heard the action. Whatever the action was, Lawrence J. had dismissed the claim on the ground, *inter alia*, that the action would not lie against agents of the Crown. The court dismissed the appeal. The effective ground of that dismissal was, I think, that stated by Scrutton L.J.: "The reason why 'this particular action must fail is that there were no liabilities 'of the Air Board to be transferred to the Air Council.'" (3) Atkin L.J., on the same page, says: "Mr. Mackenzie-Kennedy 'fails to show that the Air Council ever themselves became 'parties to a contract.'" It is true that Bankes L.J. (4) seems to express some approval of the judgment of Russell J. (which the court had overruled two months before), but I do not understand him as agreeing with the contention that no action will lie against a minister when a statute has expressly enacted that he "may sue and be sued." The other two lords justices clearly do not assert such a proposition. The second appeal, or second part of the appeal, from Lawrence J. was then heard. That was in regard to the plaintiff's claim for an alleged breach of his patent rights. That appeal was dismissed, as I gather, on the ground that the claim, if any, arose under s. 29 of the Patents and Designs Act, 1907, which provides that a government department may use a patent on such terms as may be agreed between the department and the patentee, or, in default of agreement, as may be settled by the Treasury after hearing all parties interested. Therefore, an action to recover remuneration for such use of a patent

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(1) [1923] W. N. 64; 39 Times L. R. 228; in C. A. at p. 455.

(2) (1927) 96 L. J. (Ch.) 470, 477; [1927] 2 K. B. 517.

(3) 96 L. J. (Ch.) 470, 476.

(4) *Ibid.* 473, 474.

C. A. would not lie. Incidentally, the first paragraph of the judgment of Scrutton L.J. (1) voices a protest from him, who was my master in the law, which I read with enthusiastic approval. Like him "I have been concerned with business," and like him I think that the difficulty of a subject in getting justice done against a minister or a government department is "thoroughly discreditable" to the English constitution. He adds a hope that legislation as to Crown procedure may be expected at an early date. That was in 1927. Now, in 1943, nothing of the sort has been done. Finally there was an interlocutory appeal from Fraser J. in chambers (2). I suppose that was "the third stage, the interlocutory motion, "which is yet to come" mentioned by Scrutton L.J. in the paragraph I have referred to. Fraser J. had refused to put an end to the action. The Court of Appeal overruled him. Bankes L.J. allowed the appeal on the ground that it was an action of tort, and the Air Council could not be sued in tort. Scrutton L.J. discussed various aspects of the prolonged litigation, but ends: "I allow this appeal, however, on the "ground that as the facts necessary to support the action have "been already decided by Lawrence J. against the plaintiff "in an action in which the plaintiff could have raised the legal "claims he now seeks to base on those alleged facts, the court "has an inherent jurisdiction to dismiss the action as frivolous "and vexatious." Atkin L.J. put it on the ground that the claim was in tort, and that the Air Council was not, by statute or otherwise, an incorporated body.

As a result of this melancholy review of the litigious efforts of Kennedy and his trustee I cannot find that Farwell J. was justified in saying in *Gilleghan v. Minister of Health* (3) that the Court of Appeal has held that the provision (that the Air Council "may sue and be sued") "did not entitle a subject "to sue the minister." The only ground for such a proposition is the passage in which Bankes L.J. expressed approval of the judgment of Russell J., but that was clearly an obiter dictum, since his own decision was rested on other grounds. Moreover, he was a member of the court which less than two months earlier had set aside this very judgment of Russell J. on grounds which are not apparent from the report (4).

In these circumstances I think there is not any decision of this court which constrains me to hold that where a statute

(1) 96 L. J. (Ch.) 470, 477, 479.

(3) [1932] 1 Ch. 86.

(2) [1927] 2 K. B. 517, 529.

(4) 39 Times L. R. 455.

in terms enacts that a minister or other servant of the Crown, "may sue and be sued upon a contract made by him on behalf "of the Crown" those words do not bear their manifest meaning. Further, I think the words we are concerned with in the statute of 1867, that the minister "may institute and "prosecute any action . . . concerning stores . . . contracted "to be delivered to him . . . and may defend any action . . . "concerning such stores," though not so explicit, ought to be given the same meaning, namely, that on such a contract the minister may sue the other party to it for breach of it and that the other party, though a subject of the Crown, may equally sue the minister for an alleged breach of the contract by him. In the result, I think that the order of the Lord Chief Justice, allowing the appeal from the master, was correct, and this appeal should be dismissed, the costs in this court to be the defendants' in any event.

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GODDARD L.J. read the following judgment: The question which has to be decided in this appeal is, no doubt, one of considerable importance. It is, apparently, the first occasion on which this court has directly to decide whether a minister of the Crown who by statute is empowered to sue and to defend actions in respect of matters appertaining to his office, or who, as it is expressed in some statutes, may sue and be sued, is none the less entitled to object that he is immune from being sued or having a counterclaim raised against him in an action which he himself has instituted unless he consents to the subject availing himself of the right which any layman would, I feel sure, consider was conferred in plain language by the legislature. For myself, I could wish that the question had been raised in circumstances that disclosed at least some semblance of merits. Here the minister is suing for damages, which he places at the not inconsiderable sum of 2235*l.*, yet he objects to the defendants counterclaiming for, or seeking to reduce the amount of damages by, the comparatively trivial sum of 68*l.* 12*s.* For that, he says, the defendants must file a petition of right. It is difficult to see what possible advantage can accrue to the minister if he is right. The only result, I should think, would be that the defendants would apply for this action to stand until the petition of right was ready for trial so that the two proceedings could be heard together, and I can hardly imagine that the court would countenance the waste of time and money that would be

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involved if the two were tried separately. It may be that it would be a satisfaction to those who advise or act for the minister (for I do not suppose he personally knows anything about the matter) to feel that they, who litigate at the public expense, whether successfully or otherwise, can put the subject to the maximum of inconvenience and expense, and thus, perhaps, deter others from being rash enough to bring claims in which they believe against a department, but the advantage to the public interest, which ought to be the paramount consideration, is, to say the least, inconspicuous. The Lord Chief Justice has decided against the minister, and I respectfully agree with him.

It appears as plain as anything can be that a counterclaim is a proceeding, and, is, indeed, simply a cross-action. The filing of a counterclaim is equivalent to the issue of a writ. Thus, if the claim raised thereby is liable to be met by a plea of the Limitation Act, the material date is that on which it was filed. It is objected that a counterclaim is entirely the creature of the Judicature Act, 1873, which was not passed till six years after the Act we are now considering and which did not bind the Crown. I shall consider hereafter the effect of the first proviso to s. 20 of the War Department Stores Act, 1867 but, apart from that, it is, I think, immaterial that a counterclaim was first permitted after the Act of 1867 came into force. It is a "proceeding" within the section so long as it relates to any such stores, matter, or thing as are therein mentioned. It is said that this section relates only to procedure and neither confers nor alters rights or causes of action. In my opinion, that cannot be correct. Consider, first, the position of the minister as plaintiff. He has bought or acquired stores, not for himself, but for His Majesty. He was an agent, and as such had no right to sue. It is said that the only effect of the section is to permit an action to be brought instead of a proceeding by way of information. The right of His Majesty to proceed by way of information is preserved, and when that process is adopted, although the information is filed by the Attorney-General, he is not the plaintiff. He informs the court of the Crown's cause of action. The object of this section seems to me to confer on the minister a cause of action which otherwise would be only in his principal, and thus to enable him to sue as though he were the principal. Put in another way, the section enables the minister, in relation to military stores, to take the position

that he and not the Crown is the contracting party or the owner of the property in them, while preserving, by the second proviso, the right of the Crown to assert its rights and ownership if it pleases. Then it would seem only consistent with the most elementary principles of justice that, if that right be conferred on the minister, a corresponding obligation should also be imposed. If he may sue why should he not also be liable to be sued in respect of the matters or things dealt with by the section? So the section provides that he may defend any action, suit, or proceeding relating thereto. In my opinion, these words are clearly intended to give the subject the right to sue the minister, and are equivalent to saying that he may be sued. Almost identical words are to be found in the Admiralty Lands Act, 1821, and in *Williams v. Lords Commissioners of the Admiralty* (1), there is no doubt that the court of Common Pleas so regarded them. It is extravagant to suppose that Parliament should expressly provide for the minister defending an action which could not be brought. Obviously some meaning must be given to the words, and two are suggested on behalf of the minister. First, it is said that they deal with the case where the minister has made himself in some way personally liable. Theoretically, I suppose, the minister could, in buying military stores, undertake a personal liability to pay for them, though one cannot imagine that he would, but, if he did, no Act of Parliament is required to make him liable to an action. He would be liable on his contract. His successor in office could not be charged with his debt, nor, if he were sued on his personal contract, could any question arise as to his enjoying the rights, privileges or prerogatives of the Crown in the proceedings. So the section cannot be dealing with a situation which would, in fact, be fantastic. The more serious suggestion is that the section only means that the minister can submit to be sued if he chooses, but that the subject cannot bring against the minister, unless the latter chooses to submit, any action which he could not have brought but for the section. I cannot believe that, if Parliament says that a minister may defend an action, or may be sued, that means he has an option whether he will be sued or not. Of course, if an action is brought he need not defend any more than any other person against whom proceedings are taken. He may have no defence, but in saying that he may defend an action I think that

(1) 11 C. B. 420.

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Parliament contemplated and intended that an action should lie, and should be an effective proceeding. There have been several statutes, some earlier, some later, than the Act that we are now considering, containing a similar provision, and it is only reasonable to suppose that the object was a simplification of the law and the provision of an alternative remedy to information on the one side and petition of right on the other. This is effected by clothing the minister with the rights and obligations of a principal, so that he can enforce rights and remedies by the ordinary process of litigation, and at the same time enables the subject to sue him as though he were himself a contracting party and not the agent of the Crown. I confess that it seems to me that, if a minister can, in face of such a provision, say that he declines to allow a claim to be preferred against him, there is no room left for any meaning to be attached to the words, at least no meaning of any value, for I cannot believe that if a minister had an option he would ever fail to exercise it in his own favour. It is said that this construction is supported by the first proviso to the section. It would be contrary to all established rules of construction to hold that a right or remedy given by the substantive part of a section is entirely abrogated by a proviso thereto. I think that all that is intended by the proviso is that the minister is, in the litigation, whether he is the plaintiff or the defendant, to have the additional advantages which the Crown enjoys over other litigants in such matters, for instance, as discovery and the like. As a defendant he is to be in the same position as is the Crown when resisting a petition of right.

But it is said that the authorities point to another conclusion. The two cases most discussed before us were *Rowland v. Air Council* (1) which, with another action brought by one Mackenzie-Kennedy, came before this court. Now though, for reasons which have been fully dealt with by MacKinnon L.J. and which I need not repeat, I think that Russell J.'s remarks on the point we have to consider were obiter, I also think that he did mean that the words in s. 10 of the Air Force (Constitution) Act, 1917: "The Air Council may sue or be sued, "and may for all purposes be described, by that name" were insufficient to enable a person to sue the council unless the action was one which could have been brought independently of that section. When the case came before the Court of Appeal (2), it is clear that the actual decision of the court was

(1) [1923] W. N. 64; 39 T. L. R. 228.

(2) 96 L. J. (Ch.) 470.

that the plaintiff had not shown that the contract, which he had originally made with the Secretary of State for War, had either by statute or order in council been altered so as to substitute the Air Council for the Secretary of State for War. However, the case seems to have proceeded on the assumption or agreement that the only remedy the plaintiff would have had against the Secretary of State was by petition of right. The judgment of Scrutton L.J. makes no reference to the point we have now to consider, and Atkin L.J. expressly leaves the point open. Bankes L.J. does, however, appear to have expressed agreement with the view of Russell J. that the words of s. 10 quoted above are not sufficient to create a liability or obligation which, apart from the statute, would have no existence. This again appears, to me, to be obiter, and with great respect to the high authority both of Russell J. and Bankes L.J., I do not feel able to agree. The former looked on the matter as one which, if allowed, would effect a great constitutional change. I venture to think the effect is merely one of form and not of substance. Whatever may have been the position in former days, it is common knowledge that the Crown never refuses nowadays to grant the necessary fiat for a petition of right to proceed, unless, I suppose, the petition can be seen to be frivolous on its face: see *Ryves v. Duke of Wellington* (1), and in 1860 the Petitions of Right Act was passed, the title of which expressly states as one of its objects the simplification of procedure in such matters. By s. 7 the procedure in ordinary actions is applied to such petitions, including the right to set off, and s. 11 deals with the payment and receipt of costs by the Crown. Counterclaims were not then known, but, in view of that section, I can see no reason why the Crown should not counterclaim in the answer to a petition of right. What is certain is that the defendants in this action could present a petition of right for that for which they now counterclaim against the minister and it could be tried at the same time as the action. Parliament did make a change at least as early as 1821 in allowing a department of State to sue and defend in respect of lands acquired for the purposes of that department, though, of course, they were acquired on behalf of the Crown. In *Williams'* case, cited above (2), the court of Common Pleas had no doubt as to the right of the plaintiff to issue his writ. They did not think he could succeed in his action because it

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(1) (1846) 9 Beav. 579, 600.

(2) 11 C. B. 420.

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did not relate to lands, but it is, I think, clear that, in the opinion of the court, if it had, there would have been no objection to the action proceeding. At the present day I do not suppose the court would take the highly technical view that prevailed in that case, that the court could not inquire what was the subject-matter of the action, but only whether a writ could be issued against the defendant, but for our present purpose the important thing is that they refused to set aside a writ issued against a department of State because there was a statute which enabled a subject to sue the department.

A decision in favour of the subject in this case in no way alters the law respecting the non-liability of ministers for torts committed by their subordinates. It is as well to emphasize this point because, in the course of the argument, reliance was placed on the wide and comprehensive section in the Ministry of Transport Act, 1919, whereby, I think, for the first time in English legal history, a minister is made liable for the torts of members of his department. It is not and cannot be suggested that the words in the Act of 1867 render the Secretary of State, or Minister of Supply, liable for the torts of persons employed in those respective departments. If the minister is personally guilty of a tort, the common law holds him liable and he cannot ordinarily plead an act of State. He is not liable for the acts of persons employed in his department because they are not his servants but the servants of the Crown, and there is nothing in the Act under consideration to show that it was the intention of Parliament to alter the law in that respect. Therefore the alteration effected by this statute, and others containing the same or similar words is one of form rather than substance. I base my decision in this case on two grounds :—(1.) Where a statute says that a minister or a department of State may sue and defend any action, that is equivalent to saying he or it may sue or be sued. (2.) These words mean what they say and make the minister liable to be sued as such. The statute, in effect, changes his position from that of an agent to a principal, the object being to simplify process, but the minister is not personally liable to satisfy the judgment because it is clear that the action is against his office and not against the individual, as it is provided that the action shall not be affected by any change in the person for the time being holding the office. It must be presumed that the minister will satisfy the judgment out of moneys provided by Parliament for his

office, just as, if he brings an action and fails, he will satisfy the judgment for costs which would follow. In my opinion, the order of the Lord Chief Justice was right, and this appeal should be dismissed.

Appeal dismissed.

Solicitor for the Minister of Supply : *Treasury Solicitor.*
Solicitor for defendants : *Stuart H. Lewis.*

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LEIGHTONS INVESTMENT TRUST, LIMITED v.
CRICKLEWOOD PROPERTY AND INVESTMENT TRUST,
LIMITED.

1942

July 30 ;
Oct. 21.

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*Landlord and tenant—Building lease—Frustration—War—Inability to
comply with building covenants—Liability to pay ground rent.*

1943

May 25 ;
June 4.

By a building lease two plots of land were demised for a term of ninety-nine years to lessees who covenanted to build a specified number of shops on the land within a time limit. The lessors having claimed payment of ground rents under the lease, the lessees repudiated liability on the ground that the obligation to pay rent had been excused or discharged by frustration owing to war conditions which had almost entirely put an end to private building :—

Held, that the instrument in question was a lease and not a commercial contract in which a building lease was an incident ; that, therefore, it was not affected by the doctrine of frustration ; and that the lessors were entitled to recover.

ACTION tried by Asquith J. without a jury.

By a lease dated May 12, 1936, Fairways Homes, Ltd., demised to the defendants, Cricklewood Property and Investment Trust, Ltd., two plots of land, on an ordinary building lease for a term of ninety-nine years from March 25, 1936. Plot A consisted of ten shop sites, the rent of each of which was to be one peppercorn for the first year and thereafter 35 $\frac{1}{2}$ l. a year. Plot B consisted of sites for fourteen shops the rent for each of which was to be one peppercorn until one year from the date of notification that the necessary consent for the building of the shops had been received and thereafter 35 $\frac{1}{2}$ l. a year. The lessees covenanted under the lease (inter alia) to pay the rent, etc., and to build twenty-four shops on the two plots within a specified time. On May 17, 1938, the

1942 LEIGHTONS INVESTMENT TRUST, LD. v. CRICKLEWOOD PROPERTY AND INVESTMENT TRUST, LD. plaintiffs, Leightons Investment Trust, Ltd., bought from Fairway Homes, Ltd., the reversion dependent on the lease. Before the commencement of the war the ten shops which the lessees had covenanted to erect on plot A had been built. On plot B only four of the fourteen shops which the lessees had covenanted to erect had been built. It was admitted that the obligation to build on the other ten sites did not arise until after the commencement of the war. The plaintiffs claimed rent in respect of the fourteen sites on plot B. The defendants contended that all obligations under the lease had been excused or discharged by frustration owing to conditions resulting from the war having practically put an end to private building.

Fortune for the defendants. The doctrine of frustration does not apply to an ordinary lease for obvious reasons, but this instrument is not a lease for the purpose of applying the doctrine of frustration. It is a commercial adventure or speculation, an ordinary commercial contract, and as such it is capable of frustration. "To affirm such a contract as "standing generally, although at the present time and for an "indefinite period it cannot be acted on, is not to maintain "the original contract but to substitute a different contract "for it. The result is that the war having interfered with "the performance of this contract the contract is dissolved " : per Rowlatt J., in *Distinguite Hematite Iron Co., Ltd. v. Possehl & Co.* (1). In *Matthey v. Curling* (2) Atkin L.J., in a dissenting judgment, said : "It does not appear to me conclusive against "the application to a lease of the doctrine of frustration that "the lease, in addition to containing contractual terms, grants "a term of years. Seeing that the instrument as a rule "expressly provides for the lease being determined at the "option of the lessor upon the happening of a certain specified "event, I see no logical absurdity in implying a term that it "shall be determined absolutely on the happening of other "events—namely, those which in an ordinary contract work "a frustration."

St. John Field K.C. and *Gerald Gardiner* for the plaintiffs. The doctrine of frustration has no application to a contract which creates an estate by demise : *Whitehall Court, Ltd. v. Ettlinger* (3). In *Swift v. MacBean* (4) Birkett J. held that

(1) [1916] 1 K. B. 811, 814.

(3) [1920] 1 K. B. 680.

(2) [1922] 2 A. C. 180, 200.

(4) [1942] 1 K. B. 375.

the doctrine had no application to the lease of a furnished house. The dissenting judgment of Atkin L.J. in *Matthey v. Curling* (1) was not approved by the House of Lords. [*London and Northern Estates Co. v. Schlesinger* (2); and *Wainwright v. Ramsden* (3) were also referred to.]

Cur. adv. vult.

1942. Oct. 21. ASQUITH J. read a judgment in which he stated the facts as set out above, and continued: The sole issue before the court is whether the doctrine of frustration applies to a building lease such as that involved in this case. If it does so apply, then, on the facts, I should decide that the contract had been discharged. There is no question that, if it does not apply, the sums claimed by the plaintiff company are due to it from the defendant company.

It is not disputed that the doctrine of frustration has no application to an ordinary lease: *Matthey v. Curling* (1); *London and Northern Estates v. Schlesinger* (2); and *Whitehall Court, Ltd., v. Ettlinger* (4); nor has it any application to a lease of a furnished house, as was decided recently by Birkett J. in *Swift v. MacBean* (5). The ratio decidendi of these decisions is plain. A contract may be frustrated, but a demise is more than a contract. It is a conveyance of an estate in land or a chattel real. It transfers proprietary as well as personal rights. This seems to me just as true of a building lease as of any other kind of lease. I need not review the cases so fully assembled and commented on by Birkett J. in *Swift v. MacBean* (5).

It was strenuously argued by Mr. Fortune, for the defendants, that the building scheme involved in the present case was a broad commercial undertaking capable of frustration, and that the building lease was a mere pendant or adjunct of that larger venture. The fact remains that the instrument with which I have to deal is a lease, whatever its ulterior or broader objects; that, as such, the vested rights of property did not merely create a contractual right; and that, on the reasoning applied by the court of first instance and by the majority of the Court of Appeal in *Matthey v. Curling* (1)—a decision which was upheld by the House of Lords—such an instrument is not affected by the doctrine of frustration. There must,

(1) [1922] 2 A. C. 180, 200.

(2) [1916] 1 K. B. 20.

(3) [1839] M. & W. 602.

(4) [1920] 1 K. B. 680.

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1942 accordingly, be judgment for the plaintiffs for the sum claimed,
with costs.

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The defendants appealed.

1943. May 25. *Fortune* for the defendants.

St. John Field K.C. and *Gerald Gardiner* for the plaintiffs.

Cur. adv. vult.

C. A. June 4. The judgment of the court (SCOTT, MACKINNON and DU PARCQ L.JJ.) was read by MACKINNON L.J. [after stating the facts] as follows: In our opinion, the plaintiffs are clearly right. The doctrine of frustration, which was first clearly enunciated in 1863 in *Taylor v. Caldwell* (1), has been applied to a variety of contracts, but it has never been applied to a demise of real property. Indeed, there is clear authority that it cannot be so applied. This is to be found in *London and Northern Estates Co. v. Schlesinger* (2), in *Whitehall Court v. Ettlinger* (3) and in *Matthey v. Curling* (4). All these cases, and many others, have recently been reviewed by Birkett J. in a careful judgment in *Swift v. Macbean* (5). We do not think it necessary to examine the question further. It is impossible for the defendants to rely on the doctrine of frustration to relieve them from their obligation as tenants under a demise of land for ninety-nine years. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiffs: *Leslie Freeman & Co.*

Solicitors for defendants: *Langford, Borrowdale & Thain.*

(1) (1863) 3 B. & S. 826.

(4) [1922] 2 A. C. 180.

(2) [1916] 1 K. B. 20.

(5) [1942] 1 K. B. 375.

(3) [1920] 1 K. B. 680.

P. B. D.

DICK v. PILLER.

C. A.

*County court—Adjournment of hearing—Illness of material witness—
Duty of judge.*

1943
Apr. 7;
May 4.

When a witness in, or a fortiori a party to, an action in a county court is alleged to be prevented by illness from attending the court for a hearing of the case and the judge is satisfied of the fact of his illness and of the materiality and importance of his evidence and that the granting of an adjournment will not cause an injustice to the other party which cannot be reduced by costs, it is the duty of the judge to grant an adjournment, it may be on terms, and failure on his part to do so constitutes a miscarriage of justice which necessarily involves an error of law on which an appeal may be founded :—

So held by the Court of Appeal (Scott L.J. and Croom-Johnson J., du Parcq L.J. dissentiente).

APPEAL from Epsom county court.

The plaintiff, Robert Dick, a trainer of race-horses, brought an action in the county court against the defendant, Henry Piller, to recover 5*l.* 8*s.* 1*d.* which he alleged to be due under an oral arrangement made between the parties in connexion with the training and racing of race-horses belonging to the defendant's daughter. The case came on for hearing on September 16, 1942. It was not concluded on that day, and the hearing was ultimately postponed by consent until December 9, on the ground of the defendant's illness, a medical certificate regarding his state of health being filed with the consent. On December 2 the defendant's doctor gave a certificate in writing to the effect that by reason of ill health, the defendant was unable to follow his occupation. On December 3, the defendant's solicitors by letter informed the plaintiff's solicitors of the defendant's illness, sent them a copy of the doctor's certificate, and asked for a further adjournment of the case. This request was refused. On December 7, the defendant's solicitors again wrote to the plaintiff's solicitors enclosing a further medical certificate to the effect that the defendant would be unable to leave home probably for two weeks. On December 9, the defendant's solicitors and counsel attended the court. His counsel, in applying for an adjournment, informed the judge of the position, read the correspondence which had passed between the solicitors, produced the medical certificates and told the judge that the defendant's doctor could, if necessary, attend

C. A. the court or swear an affidavit. The judge refused to grant
1943 an adjournment, and the hearing of the plaintiff's case was
continued. At its close the defendant's counsel again asked
DICK for an adjournment on the ground that the defendant's
v. evidence was vital, but this application also was refused.
PILLER. The only witness available to the defendant gave evidence,
and the judge gave judgment for the plaintiff for 44*l.* 3*s.* 10*d.*
The judge's note with reference to the application for an
adjournment read: "Adjournment refused in absence of
"affidavit." The defendant appealed on the ground that,
in view of the materiality of the defendant's evidence and of
his condition of health, the refusal of the judge to grant an
adjournment constituted a miscarriage of justice.

J. L. Poole for the defendant.

H. M. Pratt for the plaintiff.

Cur. adv. vult.

May 4. The following judgments were read :

SCOTT L.J. This is an exceptional case involving a point of practice of some importance in regard to the right of appeal to the Court of Appeal where a county court judge refuses an adjournment asked for on the ground of the inability of a party to attend whose evidence is materially relevant to the proper hearing of his case. Prima facie his discretion is unfettered, and, in addition, it may be that the Court of Appeal has less power to interfere with him than with a High Court judge from whom an appeal lies on fact as well as law, but the very finality of his decision on every question of fact increases, if anything, the importance of this court, if it thinks the discretion has been wrongly exercised, making sure that there has been no error of law. The appellant was defendant in an action for 51*l.* 8*s.* 1*d.* brought by his agent against him as principal on a running account between them in respect of moneys paid by, or remuneration for services rendered, in connexion with the training and running of the defendant's horses in races. The defendant admitted indebtedness for rather more than half the amount claimed, but sought to "surcharge and falsify" the plaintiff's account in certain respects, disputing the balance on the ground of part overpayments and various other grounds which it is unnecessary to investigate for the purpose of the appeal, as it is, in my

opinion, clear that the current arrangements were throughout made by word of mouth, and the payments were made personally between the plaintiff and defendant without documentary records. The defendant's evidence was, therefore, material, and, perhaps, critically important, if the issues raised were to be really tried on their merits, for nobody else could give his evidence. In refusing the adjournment, therefore, I think that the county court judge deprived the defendant of a hearing.

The only question in the appeal is whether the judge erred or misdirected himself in law in refusing the adjournment. *du Parcq L.J.* thinks that, if the judge erred, his error was an error of fact. *Croom-Johnson J.* thinks there was an error of law. I have read both judgments with care, and agree with the conclusion arrived at by the latter, although I agree with the former that, if the refusal of the adjournment had been an exercise of discretion on a pure question of fact, no appeal would have lain under s. 105 of the County Courts Act, 1934. On the facts relating to the application for adjournment, I think the judge caused a serious miscarriage of justice, and that, in doing so, he neglected a first principle of law, for he deprived the defendant of his elementary right to be heard before he was condemned.

[His lordship detailed the facts, and continued:] The case resolves itself into a short question of law. If an important witness—a fortiori if he is a party—is prevented by illness from attending the court for an adjourned hearing, at which his evidence is directly and seriously material, what is the legal duty of the judge when an adjournment is asked for? In my view, if he is satisfied (1.) of the medical fact and (2.) that the evidence is relevant and may be important, it is his duty to give an adjournment—it may be on terms—but he ought to give it unless, on the other hand, he is satisfied that an injustice would thereby be done to the other side which cannot be reduced by costs. These questions may depend on matters of degree, and matters of fact may be involved (as *du Parcq L.J.* truly says), but on the facts of the present case I think the judge went wrong in law, because (1.) my two positive conditions were satisfied, and (2.) no suggestion was made that an injustice would result to the plaintiff.

I am confirmed in this opinion by noting that he corrected the copy of his judgment which, as typed, merely said

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"adjournment refused," by adding the reason for his refusal, which he did by writing in ink the words "in absence of "affidavit." That was, in my opinion, on the facts a wholly inadequate reason in law for depriving the defendant of a hearing. Apart from any offer by counsel for the defendant, the judge could on his own motion have imposed any terms of costs and also payment to the plaintiff of his admitted part of the claim and payment into court of part of the balance of the claim as a condition of granting the adjournment. Under s. 1, sub-s. 5, of the Evidence Act, 1938, both the plaintiff's solicitors and the judge ought in all the circumstances, and especially in view of the correspondence, to have accepted the medical certificate of December 7, without an affidavit, for that section, in my view, was an ample justification for the defendant's solicitors not going to the expense of an affidavit. I cannot help thinking that suspicion without sufficient foundation was in the mind of both the plaintiff's solicitors and the judge, and, if it was in his mind, it was all the more important for him to see the defendant under cross-examination in order to find out whether his suspicion was well-founded. The observations both of Atkin L.J. and of Lawrence L.J. in *Maxwell v. Keun* (1) are in point. *Jones v. S.R. Anthracite Collieries, Ltd.* (2) in the Court of Appeal, is authority that the question raised by this appeal is covered by s. 105 of the County Courts Act, 1934, and, I think, affords some support to the view I take that where a miscarriage of justice, such as I think took place here, occurs it necessarily involves an error of law. The appeal must be allowed, and the case remitted to the county court for re-hearing.

DU PARCQ L.J. The first question, and on the view which I have formed the only question, to be decided in this appeal is whether the defendant can establish that the "determination" of the judge of which he complains was a "determination . . . in point of law . . . or upon the admission or rejection of "any evidence." It is hardly necessary to cite authorities to show that the limitation on the right of appeal from the county courts which has long been imposed by statute, and is now prescribed by s. 105 of the County Courts Act, 1934, has been carefully observed by this court, but I will refer briefly to two of them. In *How v. L. & N. W. Ry. Co.* (3) an

(1) [1928] 1 K. B. 645, 657, 659.

(3) [1892] 1 Q. B. 391, 393.

(2) (1920) 124 L. T. 462.

appeal was brought against the decision of a county court judge who had granted a new trial on the ground that the verdict of a jury was against the weight of evidence. It was contended that, if the evidence in the case were looked at, it would be seen that the judge had not acted within the principles stated in *Metropolitan Ry. Co. v. Wright* (1). This court dismissed the appeal without calling on the respondents' counsel. The judge had stated that he was following the judgments of the House of Lords in *Metropolitan Ry. Co. v. Wright* (1). "What followed afterwards" said Fry L.J. "was a decision on a question of fact; and if he made an error, it was an error in fact." It may be useful to compare with *How v. L. & N. W. Ry. Co.* (2) the decision of the House of Lords in *Brown v. Dean* (3) where the order of a county court judge that there should be a new trial was set aside because he had disregarded well-settled principles of law. In the recent case of *Henderson v. Clifford Watmough & Co.* (4) the appeal was against an award of damages by a county court judge, the ground of appeal being that the damages awarded were much too small. The appellant sought to rely on the principles laid down by Greer L.J. in the well-known case of *Flint v. Lovell* (5). This court dismissed the appeal on the ground that it was not shown that the judge had "erred in point of law." The judgment of the court contains this passage: "We would only add that in our opinion it is not useful to consider in this connexion decisions as to the duty of this court in considering appeals against the verdict of a jury or a decision of a judge of the High Court sitting without a jury."

The present appeal is in form brought against a judgment under which the plaintiff recovered 44*l.* 3*s.* 10*d.* and costs against the defendant and a counterclaim by the defendant was dismissed. In substance what is appealed against is the judge's refusal to adjourn the resumed hearing of a part heard case. Application was made for an adjournment on the ground that the defendant was a necessary witness and was prevented by illness from attending the court. The notice of appeal states the facts and summarizes the grounds of appeal in the words: "and in the premises there was a mis-carriage of justice." [His Lordship stated the facts.] I

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(1) (1886) 11 App. Cas. 152.

(4) (1939) 161 L. T. 233.

(2) [1892] 1 Q. B. 391, 393.

(5) [1935] 1 K. B. 354, 360.

(3) [1910] A. C. 373.

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understand the judge's note to mean that, in all the circumstances, he was not prepared to accept the certificates as sufficient proof that the defendant was prevented by illness from being present. Counsel for the plaintiff had not objected to the reading of the certificates, but he had not admitted the truth of their contents, and in those circumstances it was for the judge to say what weight he would give to them.

Before the passing of the Evidence Act, 1938, a medical certificate not verified by affidavit was not in strictness admissible at all, though it was often received without objection when there were no grounds for suspecting the good faith of the party producing it. The legislature has, however, intervened and by s. 1, sub-s. 5, of the Evidence Act, 1938, it is provided as follows: "The court may, . . . in deciding "whether or not a person is fit to attend as a witness, act "on a certificate purporting to be the certificate of a registered "medical practitioner" It should be added that s. 2 of the same Act leaves it to the judge to estimate "the weight, "if any, to be attached to a statement rendered admissible "as evidence" by the Act. There is nothing to show whether these provisions were present to the judge's mind, except that, apparently, counsel did not draw his attention to them. The judge may very well have had the Act in mind, and deliberately exercised the discretion which it allowed him by refusing to act on the certificates. On that view, it is plainly impossible to say that the judge erred in law. If, on the other hand, it is to be supposed that the judge was unmindful of the Act, it is not open to the defendant to found any complaint on this as his counsel did not take the point before the judge that the certificates were admissible under the Act. The omission is, I think, hardly blameworthy. The judge had, in fact, read the certificates, without objection by the plaintiff, and refused to act on them. There can be no doubt, in my opinion, that a judge is free to reject evidence of this character when it is only admitted by favour of the other party, who, while admitting it for what, in the estimation of the court, it may be worth, makes no admission as to the truth of its contents. Counsel could hardly have expected that the judge would have changed his view as to "the weight "if any" to be given to the certificates if he had had the Evidence Act, 1938, open before him. I will assume that, if the judge had been satisfied that the defendant was prevented by illness from attending, his decision to proceed with the

hearing would have been an error in point of law. As he was not so satisfied, there was no ground for an adjournment, and we are not concerned with the question whether, assuming the truth of the certificates to have been proved, it would have been proper for the judge to grant an adjournment in the exercise of his powers under Or. XIII., r. 4, of the County Court Rules, 1936-1941.

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For the reasons which I have given, I find it impossible to hold that the judge erred in law when he held that the allegation that the defendant was ill, and, therefore, unable to attend, was not proved. This is a question of fact, and nothing else. If it be true to say that there was "a miscarriage of justice" (and as to this I express no opinion) an error in fact and not in point of law was the cause of the miscarriage. It was suggested, alternatively, that the judge had come to a wrong determination "upon the admission or rejection of evidence." If this suggestion means that he wrongly rejected the medical certificates, I have already dealt sufficiently with the point. If it means that he rejected or refused to admit the evidence of the defendant, I find it difficult to understand. A judge does not reject evidence which is not tendered. If a witness is absent without good cause nobody can complain that his evidence has not been heard. In this case, the judge was not satisfied that the excuse put forward for the defendant's absence was a true one.

These reasons lead me to the conclusion that this court has no power to interfere with the decision of the county court judge. It is necessary, however, that I should refer to two decisions on which much of the argument of the defendant's counsel was founded. The first is *Evans v. Bartlam* (1), a decision of the House of Lords in which the power of the Court of Appeal to interfere with the exercise of a judge's discretion was the subject of debate. This case, in my opinion, has no bearing on the present appeal. It is plain from a consideration of the speeches of the learned lords that they were dealing, and dealing only, with appeals from judges of the High Court. Thus Lord Atkin said: "Appellate jurisdiction is always statutory: there is in the statute no restriction upon the jurisdiction of the Court of Appeal: and while the appellate court in the exercise of its appellate power is no doubt entirely justified in saying that normally it will not interfere with the exercise of a judge's discretion except on grounds

(1) [1937] A. C. 473, 480, 481.

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"of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and the duty to remedy it." These observations (on which, strangely enough, counsel for the defendant was disposed to rely) are plainly inapplicable to appeals from the county court since in such appeals there is a restriction on the jurisdiction of the Court of Appeal, and the appellate court has neither the power nor the duty to interfere with the judge's discretion except on grounds of law, even if it sees that the decision may result in injustice. The second case to which I must refer is *Jones v. S. R. Anthracite Collieries, Ltd.* (1), a decision of this court on which the defendant's counsel strongly relied. In that case a county court judge, exercising his jurisdiction under the Workmen's Compensation Act, 1906, had refused to allow an adjournment. This court came to the conclusion that the judge had, or possibly might have, acted on wrong grounds. There is no report of the argument, but Lord Sterndale, in his judgment said: "The respondents say that any question of adjournment is a matter which is within the discretion of the county court judge. So it is, and this court would not interfere if it appeared to them that such discretion had been exercised in a way which showed that all necessary matters have been taken into consideration, although they might not agree with the learned county court judge's decision." Lord Sterndale added that his impression was that this court had interfered with the decision of "even High Court judges in regard to 'adjournments,'" and Scrutton L.J. was under a similar impression. Under the Workmen's Compensation Act, 1906 (as under the Act of 1925) there is no provision for an appeal to the Court of Appeal except where a question of law is involved, and, therefore, one of two assumptions must be made, either, (1.) counsel omitted to argue, and the court failed to observe, that the powers of the court were thus limited, or (2.) the court was satisfied on the facts of the case that a question of law was raised by the judge's decision. It is difficult to believe that the point was overlooked by the court and by the experienced counsel who appeared at the bar. On the other hand, I find it difficult to discover what the question of law was, especially as the Master of the Rolls seems to have thought it possible that the judge had refused the application on "quite reasonable grounds." It may be that some distinction, which I am

(1) 124 L. T. 462, 463.

not at present able to discern, can be drawn for the present purpose between appeals under the Workmen's Compensation Act and appeals which are regulated by s. 105 of the County Courts Act, 1934. I am disposed, however, to regard the case as deciding that the particular facts there shown to exist (which, apparently, were not in dispute) so clearly justified the application for an adjournment that the judge must be taken to have misapplied the law when he refused that application. So regarded, it has no relevance to the present appeal. Whatever else it may decide, it cannot be an authority for the proposition that an appeal will lie from a county court judge's decision on a question of fact and cannot justify this court in ignoring a statutory limitation on its powers which it is an elementary duty to observe. In my opinion, the only order which this court has power to make is that the appeal should be dismissed, and I think that the usual consequences should result.

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CROOM-JOHNSON J. [after stating the facts:] I have no doubt whatever, not only that the defendant's evidence was relevant, but also that it was essential to the proper presentation of the defence and vital to be considered if justice was to be done or to appear to be done.

On the question whether there has been a wrong exercise of discretion a number of authorities were cited to us. In view of the passages from the judge's notes to which I have already referred, I feel sure that the judge must have taken into consideration statements which on more thorough examination turn out to be inaccurate. He had, apparently, made up his mind on September 16, long before any question of illness arose, to proceed with the trial at the adjourned hearing even if the defendant were absent. I cannot believe that the judge applied his mind to the possibility of an injustice resulting from the case being decided without the defendant's evidence. Had he done so, he must, I think, have come to only one conclusion. He would then have had to consider whether a miscarriage of justice might arise to the plaintiff if an adjournment were granted. I can find no trace in the judge's notes of these points being considered or even being discussed or whether an award of costs would not meet the case.

I turn to the authorities. The question whether there shall be an adjournment of the proceedings in cases arising under the Workmen's Compensation Act, 1906, is one which is within the discretion of the county court judge before whom

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such proceedings are pending. Although this court has power to interfere with the judge's decision in regard to the granting of an adjournment it will refrain from doing so unless it appears that the discretion has been exercised in a way which shows that all necessary matters have not been taken into consideration: *Jones v. S. R. Anthracite Collieries, Ltd.* (1). In that case, in the absence of any reason being stated for refusing to allow an adjournment and there being no evidence on which a refusal could properly be based, this court allowed an appeal. Lord Sterndale M.R. says: "this court would not interfere if it appeared to them that such discretion had been exercised in a way which showed that all necessary matters have been taken into consideration, although they might not agree with the learned county court judge's decision." Scrutton L.J. says: "I should like to say in regard to the point as to whether this court has ever interfered with the decision of a county court judge in regard to an adjournment my impression . . . is that this court has frequently interfered with the decisions of county court and High Court judges in regard to the question of 'adjournment,' because the whole object of this court and every court should be to do justice between the parties without dealing with technical objections." So far as regards such questions in ordinary county court actions, apart from the Workmen's Compensation Acts, the observation is obiter dictum, but I find it difficult to believe that Scrutton L.J. overlooked the specific provisions of the County Court Act as to appeals. As I read the decision in the case last cited, there being no appeal on fact, this court must have dealt with the matter as one of law. On the question of interference generally with the exercise of discretion by a High Court judge, Atkin L.J. in *Maxwell v. Keun* (2) is reported as having said: "The other point that was made by the defendants was that this was a discretionary order and that the Court of Appeal ought not to interfere with the discretion of the learned judge. I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the court has power to

(1) 124 L. T. 462, 463.

(2) [1928] 1 K. B. 645, 653.

"review such an order, and it is, to my mind, its duty to do so." *Donald Campbell & Co. v. Pollak* (1) was an appeal relating to costs only, where there was no appeal at all. I refer, without quoting them, to the remarks of Lord Atkin in *Evans v. Bartlam* (2); and to the statement of the law by this court in *Sackville West v. Attorney-General* (3), and of Lush J. in *Ord v. Ord* (4). In an appeal from a county court in *Hammond Brothers and Champness, Ltd. v. Jackson* (5) a divisional court, to which such an appeal then went, heard without objection an appeal against the exercise of discretion postponing a trial. Bray J. was a party to that decision, and I find it difficult to believe that that learned judge could have overlooked the point if it was a good one. It has, I think, always been maintained that an exercise of judicial discretion on a wrong principle is appealable. To exercise it on wrong considerations or on wrong grounds, or to ignore some of the right considerations, is, in my judgment, to decide on wrong principles. The effect of the judge's order was to reject in advance the defendant's evidence altogether. Why? Apparently, if we are to accept the addendum to his note, on the ground that there was no affidavit in support of the certificates or verifying them. No doubt, an affidavit in support of such applications is usual in cases where the facts stated in the certificates are disputed, but I should be sorry to think that it is necessary to incur the expense of an affidavit to prove facts which are not in dispute. The certificate of December 7, 1942, was, in my opinion, sufficient *prima facie* evidence of the facts stated in it. That evidence has been rejected, and, in my view, wrongly, as to which there is an express right of appeal given by s. 105 of the County Courts Act, 1934.

For all these reasons I have come to the conclusion that this appeal is competent, that the judge's discretion was wrongly exercised, and his order wrong. It follows that I think the appeal should be allowed.

Appeal allowed.

Solicitors for defendant: *A. W. Rhodes & Co.*

Solicitors for plaintiff: *Tuck & Mann.*

(1) [1927] A. C. 732.

(2) [1937] A. C. 473, 480.

(3) [1910] 128 L. T. Jour. 265.

(4) [1923] 2 K. B. 432, 439.

(5) [1914] 1 K. B. 241.

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Metropolis—Quarter sessions—Appeal—Recognizance—Breach—Order by magistrate for forfeiture—Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 50—Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 9, sub-s. 1.

Where a metropolitan magistrate, acting under s. 9, sub-s. 1, of the Summary Jurisdiction Act, 1879, adjudges that a recognizance conditioned for the appearance of a person before the Court of Summary Jurisdiction is forfeited and that the defendant do pay the sum due under the recognizance, that is a "summary order" within s. 50 of the Metropolitan Police Courts Act, 1839, and, therefore, if the sum exceeds 3*l.*, an appeal lies therefrom to quarter sessions.

Such an adjudgment is not a conviction and so no appeal lies from it under s. 37, sub-s. 1, of the Criminal Justice Administration Act, 1914, and the heading: "Conviction" to form 14 in the schedule of forms to the Summary Jurisdiction Rules, 1915, is a misdescription.

CASE stated by the chairman of London sessions.

On June 29, 1942, the appellant, William Alfred Cockhill, was bound by his recognizance at North London police court in the sum of 750*l.*, the condition of the recognizance being that Frederick Harris should appear at that court on July 6, 1942. Harris did not so appear and on July 8, 1942, the appellant appeared at the court to show cause why the recognizance should not be adjudged to be forfeited. The magistrate then made the following adjudgment, pursuant to s. 9, sub-s. 1, of the Summary Jurisdiction Act, 1879:

"William Alfred Cockhill (hereinafter called the defendant) "was by his recognizance entered into on June 29, 1942, "bound in the sum of 750*l.*, the condition of the recognizance "being that Frederick Harris should appear at North London "Police Court on Monday, July 6, 1942. And it is now "proved that the said Frederick Harris did not appear at the "said court on the said date, the same being a breach of the "said condition. It is therefore adjudged that the said recog- "nizance be forfeited, and that the defendant do pay to the "clerk of this court the sum of 750*l.*, and that the said sum "should be paid at the rate of 300*l.* within seven days and the "balance within fourteen days. And in default of payment it "is ordered that the sum due from the said defendant under "this adjudication be levied by distress and sale of his goods.

"(Signed) Daniel Hopkin.

"One of the magistrates of the police courts of the metropolis.

"Schedule I. 14.

"Conviction (Forfeited Recognizance)."

Following the adjudication, the appellant received from the chief clerk of the police court a notice headed: "Notice of "Fine (Money Payments (Justices Procedure) Act, 1935, s. 3)," which stated that on July 8, 1942, the appellant was ordered by the court to pay 750*l.* (300*l.* within seven days and the balance within fourteen days), payment to be made by post to the chief clerk of the court or personally at the court, and that failure to pay within the time fixed for payment would render the appellant liable to arrest or his money and goods liable to distraint without further notice. On July 9, 1942, the appellant entered notice of appeal against the adjudgment of the magistrate forfeiting his recognizance on the grounds that (1.) the order was excessive, and (2.) the court should have reasonably exercised its discretion by remitting the whole or part of the recognizance. When the appeal came on for hearing on September 3, 1942, it was contended by way of preliminary objection on behalf of the respondent, David Davies, a police inspector, that quarter sessions had no jurisdiction to hear the appeal. The chairman, after hearing arguments, expressed the opinion that he had no jurisdiction to hear the appeal, which he dismissed, but he stated this case.

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Lloyd-Jones for the appellant. The chairman was wrong in holding that no appeal lay from the decision of the magistrate. The form which the court purported to follow here was form 14 of the schedule of forms to the Summary Jurisdiction Rules, 1915, which was adapted to meet the requirements of the case. The document embodying the order of the court was described, after the signature of the magistrate as "Schedule I. 14. "Conviction (Forfeited Recognizance)," following the heading to form 14, and the court treated what had happened as being in the nature of a conviction with the imposition of a fine. If it was a conviction, then, by s. 37, sub-s. 1, of the Criminal Justice Administration Act, 1914 (1), there was a right of appeal. If, however, it was not a "conviction," the appellant still has a right of appeal since the order of the magistrate was clearly a "summary order" within the meaning of s. 50 of the Metropolitan Police Courts Act, 1839 (1).

(1) By Metropolitan Police Courts Act, 1839, s. 50: "In every case of summary order or conviction before any of the said magistrates, in which the sum or penalty adjudged to be paid

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The words of that section are wide enough to cover what took place in the present case. Sect. 50 remains unaffected by subsequent Acts, because, if a right of appeal is to be taken away by a later Act, it must be by specific words, and the right given by s. 50 has not been abrogated by any later statute : *Mittelman v. Denman* (1).

Geoffrey Howard for the respondent. There never has been any general right of appeal against a declaration that a recognizance is forfeited and an adjudgment that the defendant should pay the amount thereof except possibly under s. 50 of the Metropolitan Police Courts Act, 1839, but the right of appeal given by that section was abrogated by the Summary Jurisdiction Act, 1879, or by the Criminal Justice Administration Act, 1914 : *Moseley v. Director of Public Prosecutions* (2). Even if the right of appeal granted by s. 50 still survives, the words in that section : "summary order . . . in which the "sum or penalty adjudged to be paid shall be more than "three pounds" are inapplicable to the case of a declaration that a recognizance is forfeited and an adjudgment for payment due thereunder. It is clear that before the Summary Jurisdiction Act, 1879, came into force there was no such right of appeal as is here claimed. The proviso to sub-s. 1 of s. 9 of that Act confers on a person against whom a declaration has been made that a recognizance is forfeited the right to go from one court of summary jurisdiction to another to seek the cancellation or mitigation of the forfeiture on the conditions there laid down, and that proviso gives the appellant his sole remedy. It could not have been the intention of the legislature to provide an appeal against such a declaration of forfeiture because there is nothing to appeal against. There having been a breach of the condition of the recognizance its forfeiture follows. If an appeal does lie under s. 50 the position

"shall be more than three pounds,
"or in which the penalty adjudged
"shall be imprisonment for any
"time more than one calendar
"month, any person who shall
"think himself aggrieved by the
"order or conviction may appeal
"to the justices of the peace at
"the next general or quarter
"sessions of the peace . . ."

By Criminal Justice Adminis-
tration Act, 1914, s. 37, sub-s. 1 :

"Any person aggrieved by any
"conviction of a court of summary
"jurisdiction in respect of any
"offence, who did not plead guilty
"or admit the truth of the
"information, may appeal from
"the conviction in manner pro-
"vided by the Summary Juris-
"diction Acts to a court of
"quarter sessions."

(1) [1920] 1 K. B. 519.

(2) [1920] 1 K. B. 16.

is anomalous for such an appeal would lie only in the metropolis.

Lloyd-Jones replied.

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VISCOUNT CALDECOTE C.J. The case for the appellant was first put on the ground that a right of appeal lay under s. 37, sub-s. 1, of the Criminal Justice Administration Act, 1914, but the words of that sub-section are quite inappropriate to fit the facts of this case, since it would be contrary to good sense to hold that there was any conviction of the appellant. A person who is bound by recognizance may be, and, indeed, very often is, a person of good character, and his character may well remain unsullied where there has been a breach of the condition of a recognizance and the forfeiture of the latter. I have not forgotten the contention which was based on the words: "Schedule I. 14. Conviction (Forfeited Recognizance)", inserted in the order of adjudication after the signature of the magistrate. Those words would appear to be there because of the heading to form 14 in the Schedule of Forms to the Summary Jurisdiction Rules, 1915, as amended—"Conviction (Forfeited Recognizance) (S.J. Act, 1879, s. 9)"—a not very intelligent adaptation. The misdescription of the form in this heading and the consequent insertion of the word "conviction" in the order of adjudication does not bring the appellant within the language used in s. 37, sub-s. 1, of the Criminal Justice Administration Act, 1914.

The appellant, however, has based his contention that the chairman had jurisdiction to hear the appeal on another ground which is worthy of examination, it being contended that this adjudication is a "summary order" within the meaning of s. 50 of the Metropolitan Police Courts Act, 1839. Since this section became law, there has been a great deal of legislation with regard to appeals from orders and convictions made by courts of summary jurisdiction. By s. 269 of the Public Health Act, 1875, a person aggrieved by any order, conviction, judgment or determination of a court of summary jurisdiction was given a very extensive right of appeal, but those provisions were repealed by s. 4 of the Summary Jurisdiction Act, 1884. Meanwhile, the Summary Jurisdiction Act, 1879, provided by s. 19: "Where in pursuance of any Act, whether past or future, any person is adjudged by a conviction or order of a court of summary jurisdiction to be imprisoned without the option of a fine, either as a

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"punishment for an offence or, save as herein-after mentioned, "for failing to do or to abstain from doing any act or thing "required to be done or left undone, and such person is not "otherwise authorized to appeal to a court of general or quarter "sessions, and did not plead guilty, or admit the truth of the "information or complaint, he may, notwithstanding anything "in the said Act, appeal to a court of general or quarter "sessions against such conviction or order." That section gives a limited right of appeal where the person concerned did not plead guilty or admit the truth of the information or complaint and where "such person is not otherwise authorized "to appeal to a court of general or quarter sessions." The provisions of s. 19 are not in the wide terms conferred by s. 269 of the Public Health Act, 1875. By s. 25 of the Criminal Justice Act, 1925, an appeal against sentence is given under certain conditions to a person who, after pleading guilty or admitting the truth of the information, is convicted of an offence by a court of summary jurisdiction. The fact that s. 19 of the Act of 1879 granted a right of appeal of a limited character while there was on the statute book a wider right of appeal which was only repealed in 1884 seems to show that a later section may give a second right of appeal when there is already in existence a right of appeal which would cover the case.

The question, however, which we have to decide depends on a consideration of the provisions of s. 50 of the Metropolitan Police Courts Act, 1839. That Act has been considered in two cases in which Lord Reading C.J. gave the leading judgment. In *Moseley v. Director of Public Prosecutions* Lord Reading said: (1) "The opinion I have formed is that "the right of appeal of a person charged before a metropolitan "police magistrate with an indictable offence which is dealt "with under s. 13 of the Summary Jurisdiction Act, 1879, by "such person pleading guilty and being sentenced to a term of "imprisonment, is limited to the right of appeal given by "s. 19 of the Act of 1879, and that s. 50 of the Act of 1839 "does not apply in that case. Once that conclusion is arrived "at it follows that there is no right of appeal in this case and "that the order of the court of quarter sessions dismissing the "appeal was right and must be affirmed." In that case the defendant had pleaded guilty to a charge of an indictable offence and had received a sentence of imprisonment without the

(1) [1920] 1 K. B. 16, 24.

option of a fine. Lord Reading continued : " It is unnecessary for me to say anything further with regard to s. 50 of the Act of 1839. I only desire to add that nothing that I have said is intended to take away the right of appeal which may be given under that statute save in the case of a person charged with an indictable offence before a court of summary jurisdiction and dealt with under s. 13 of the Summary Jurisdiction Act of 1879." Sect. 50 of the Act of 1839 also came under review in *Mittelmann v. Denman* (1), where, again, the defendant had pleaded guilty. In his judgment Lord Reading C.J. said (2) : " The question for the decision of this court is whether the appellants have a right of appeal to quarter sessions under s. 50 of the Act of 1839. It has been contended before us that the right of appeal under that section had been entirely taken away either by the Summary Jurisdiction Act, 1879, or by the Criminal Justice Administration Act, 1914. In support of that contention reliance has been placed upon the case of *Moseley v. Director of Public Prosecutions* (3). I am satisfied that that case does not govern the present case. There the offence with which the appellant had been charged was an indictable offence. Until the passing of the Act of 1879, an indictable offence had to be sent for trial as such, and it only became triable as a summary offence by virtue of that Act. The offence was dealt with as a summary offence under that Act, and the appellant was convicted and appealed. The court applied the principle that where a statute creates the jurisdiction to try an offence and gives a right of appeal from the order made at the trial, it ought to be inferred that the only right of appeal is that which is given by the statute conferring the jurisdiction." The last sentence explains the decision in *Moseley v. Director of Public Prosecutions* (3). In *Mittelmann v. Denman* (1), there was nothing as there was in *Moseley v. Director of Public Prosecutions* (3) to limit the generality of the right to appeal apparently given by s. 50 of the Metropolitan Police Courts Act, 1839.

The material words in s. 50 for the purposes of the present case are " summary order or conviction " This adjudication of the magistrate, for the reasons I have mentioned, is not a conviction, but I am unable, subject to a point to be mentioned, to give the words " summary order " a more narrow interpretation

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(1) [1920] 1 K. B. 519.

(3) [1920] 1 K. B. 16.

(2) Ibid. 526.

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than what I think is their primary meaning. To my mind, there is no doubt that the decision of the magistrate that the recognizance should be forfeited and that the appellant should be required to pay the amount due under it, was an "order." Whether the verb used be "adjudged" or "ordered" seems to me to make no difference. Although the condition of the recognizance which was required to be satisfied was that Harris should attend the court, none the less it was necessary for the magistrate to adjudge on the forfeiture and to make an order. Otherwise, although the recognizance was forfeited, the appellant would not be liable to pay anything. In other words, the powers given to the magistrate by s. 9, sub-s. 1, of the Summary Jurisdiction Act, 1879, have to be exercised. That sub-section seems to be a machinery provision, but, none the less, it would seem to require a declaration by the court and an order enforcing payment of the sum due under the recognizance. We have been referred to the proviso to the sub-section which permits the court of summary jurisdiction or any other court of summary jurisdiction for the same county, borough or place to cancel or mitigate the forfeiture. I am very doubtful whether the proviso applies to any cases other than those in which a warrant for distress for the sum has been issued. I express no positive opinion on that question of construction, because I do not think that, even if the proviso is to be more widely construed, it would be an answer to the point with which I am dealing, namely, that an order of the magistrate is necessary before the payment of the sum due under the recognizance can be obtained.

The words "summary order" are, then, wide enough to include a direction by a magistrate that a recognizance be forfeited and the amount due under it be paid. The words are used, I think, in their natural sense as applying to any order which the court may make. Even though the proviso to s. 9, sub-s. 1, of the Act of 1879 gives some sort of concurrent relief in the shape of a right to go to another court of summary jurisdiction and seek to get the forfeiture cancelled or mitigated, I see no reason why full effect should not be given to the words of s. 50, so as to hold that where an order is made for the forfeiture of a recognizance and payment of the sum due thereunder, it is a "summary order" against which there is a right of appeal.

Lastly, it was said that the words in s. 50 "in which the sum

"or penalty adjudged to be paid shall be more than three pounds, or in which the penalty adjudged shall be imprisonment for any time for more than one calendar month" were not applicable to a forfeiture of recognizances, but it seems to me that an order for payment of forfeited recognizances is an order for payment of a sum. In my opinion, therefore, as a matter of interpretation, s. 50 gives a right of appeal in the present case. I can only add an observation similar to that which Lord Reading C.J. made in *Moseley v. Director of Public Prosecutions* (1). I am reluctant to cut down any right of appeal. A large sum is involved in this case, and large sums often are necessarily involved in the recognizances into which people enter in good faith. I am happy to think that I am able without difficulty to come to a conclusion which gives a right of appeal to a man who, it may be for no real fault of his own, is subjected to an order to pay so considerable a sum as 750*l.* In my judgment, the chairman of quarter sessions came to a wrong decision in point of law and the case must go back to him to deal with on the footing that he had jurisdiction to hear the appeal.

LEWIS J. I agree. It was argued that, if we decided in favour of the appellant, we should be holding that such a right of appeal as he had contended for existed in the metropolitan area, but not outside it. That point was argued with great force in *Mittelman v. Denman* (2), and I associate myself with what Lord Reading C.J. said in that case (3): "It may be that it is undesirable that there should be a difference in practice between London and the rest of the country as regards the right of appeal from courts of summary jurisdiction; but if uniformity of practice is to be secured in this respect, it must be by the action of Parliament."

Appeal allowed.

Solicitor for appellant: *James H. Fellowes.*

Solicitor for respondent: *Solicitor for Metropolitan Police.*

(1) [1920] 1 K. B. 23.

(3) *Ibid.* 528.

(2) [1920] 1 K. B. 519.

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May 4.

REX v. DUNNE. *Ex parte* SINNATT.

Justices—Sentence—Fine—Time allowed for payment—Default—Inquiry as to means—Evidence given at previous hearing—Admissibility—Onus of proof—Money Payments (Justices Procedure) Act, 1935 (25 & 26 Geo. 5, c. 46), s. 1, sub-s. 3.

Certiorari—Practice—Applicant's right of reply.

Where a defendant who has been allowed time to pay a sum adjudged to be paid by a conviction of a court of summary jurisdiction fails to do so and the magistrate before whom he was convicted makes inquiry as to his means under s. 3, sub-s. 1, of the Money Payments (Justices Procedure) Act, 1935, the magistrate is entitled to take into consideration at that inquiry evidence as to the defendant's means which was given at the hearing when the defendant was convicted.

Rex v. Woking Justices. Ex parte Johnstone [1942] 2 K. B. 248, distinguished.

At an inquiry under s. 1, sub-s. 3, of the Act of 1935, the onus of proving that the defendant has, or has had, means does not lie on the prosecution. The sub-section is in the most general terms possible, and no onus is put on anyone to prove anything. The provisions of s. 1, sub-s. 1, of the Criminal Justice Administration Act, 1914, which places on the prosecution the burden of proving the defendant's means when a court of summary jurisdiction is considering whether or not a warrant committing the defendant to prison should be issued "forthwith," i.e., at the time of the conviction, are not to be read into s. 1, sub-s. 3, of the Act of 1935.

Under the new procedure, counsel who applies for an order of certiorari will be heard in reply.

APPLICATION for order of certiorari.

On February 12, 1942, Hispano Britannic Company, Ltd., were convicted at Bow Street police court, London, on three summonses charging them with selling goods in excess of the quota permitted under the Limitation of Supplies (Miscellaneous) (No. 5) Order, 1940, and penalties amounting to 20,000*l.* were imposed on the company. As a director of the company, the applicant, Archibald Stammers Sinnatt, was also charged with the same offences. At the hearing of the summonses evidence was given that large sums of money had been received by the company, all of which had been handled by the applicant. The applicant was fined 500*l.* on each of three summonses, and was ordered to pay 21*l.* costs. He was allowed three months in which to pay, and no order for imprisonment in default of payment was made by the magistrate. On May 29, 1942, the applicant, who had not

paid these fines and costs, attended Bow Street police court for inquiry to be made as to his means, pursuant to s. 1, sub-s. 3, of the Money Payments (Justices Procedure) Act, 1935 (1), the magistrate who held the inquiry being the magistrate who had convicted him. Counsel on his behalf informed the magistrate that he had no employment nor prospect of employment and that he had no means except a sum of 50*l.* which he was prepared forthwith to pay into court in part payment of the penalties. The magistrate did not ask the applicant to give evidence as to his means because (as he stated in his affidavit) he was addressed by counsel as to the applicant's means and saw no reason to suppose that any examination conducted by himself would elicit any further information as to the applicant's financial position. He, however, put to the applicant's counsel the evidence already mentioned which had been given on February 12, and asked counsel what had become of the money. He was informed that there were no assets of the company except one office chair. He formed the opinion that the evidence as to the part played by the applicant in the affairs of the company placed some responsibility on the applicant to gainsay it, if such a course was possible for him, and he did not consider that the statement of counsel on the

(1) By Criminal Justice Administration Act, 1914, s. 1, sub-s. 1 (as amended): "A warrant committing a person to prison in respect of non-payment of a sum adjudged to be paid by a conviction of a court of summary jurisdiction shall not be issued forthwith unless the court which passed the sentence is satisfied that he is possessed of sufficient means to enable him to pay the sum forthwith, or unless, upon being asked by the court whether he desires that time should be allowed for payment, he does not express any such desire, or fails to satisfy the court that he has a fixed abode or unless the court for any other special reason expressly directs that no time shall be allowed."

By Money Payments (Justices Procedure) Act, 1935, s. 1, sub-s. 3:

"A warrant of commitment to prison in respect of the non-payment of a sum adjudged to be paid by a conviction of a court of summary conviction shall not be issued in the case of a defendant who has been allowed time for payment unless on an occasion subsequent to his conviction the competent court has made inquiry as to his means in his presence."

Sect. 15: "In this Act . . .

"(d) the expression 'the competent court' means in relation to any sum, the court by which payment of that sum was adjudged, or any other court of summary jurisdiction for the same petty sessional division or place, or, where, by virtue of a transfer of fine order, functions in relation to that sum are exercisable by another court, that other court."

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instructions of the applicant was such as sufficed to satisfy him that the applicant's position was not that indicated by the evidence. As a result of the inquiry, the magistrate was not satisfied that the applicant had not, or had not had, means wherewith to pay the sums adjudged to be paid by his conviction. He, therefore, refused to accept the 50*l.* as part payment of the penalties, and ordered the applicant to pay 500*l.* on each of the three summonses forthwith, or, in default of payment, to be committed to prison for three months on each of the three summonses, such terms of imprisonment with regard to the second and third summonses to run concurrently. On July 24, 1942, the applicant obtained leave to apply for an order of certiorari to quash this order.

Weitzman for the applicant. At the inquiry as to means under s. 1, sub-s. 3, of the Money Payments (Justices Procedure) Act, 1935, the only material before the magistrate as to the applicant's means was the statement of the applicant's counsel that the applicant had only 50*l.* and no other assets either immediately before or after his conviction. There was, therefore, no evidence before the magistrate on which he could commit the applicant to prison. *Rex v. Woking Justices. Ex parte Johnstone* (1). Section 1, sub-s. 1, of the Criminal Justice Administration Act, 1914, shows that a warrant cannot be issued unless the court is satisfied by the prosecution that the defendant is possessed of sufficient means to enable him forthwith to pay the sums which he has been ordered to pay. Some step should have been taken at the inquiry before the magistrate to prove that the applicant had or had had sufficient means to satisfy the penalties, and the onus of that proof lay on the prosecution. [Humphreys J. But there is no provision that on this inquiry the prosecution should be present.] A defect in the procedural provisions of the Act of 1935 cannot alter the incidence of the onus of proof which is shown by sub-s. 1 of s. 1 of the Act of 1914.

Sir David Maxwell Fyfe S.-G. and *Granville Sharp* for the respondent. Where an inquiry as to means under s. 1, sub-s. 3, of the Money Payments (Justices Procedure) Act, 1935, takes place before the magistrate or bench of justices who convicted the defendant it is fantastic to suggest that the court must erase from its mind all recollection of the evidence which was given before it on the earlier occasion. Sect. 1,

sub-s. 1, of the Criminal Justice Administration Act, 1914, applies only to the proceedings at the time of the conviction, and the provisions of that sub-section cannot be read into those of s. 1, sub-s. 3, of the Act of 1935. On an inquiry as to means under this section, imprisonment follows automatically unless proof of lack of means is given, and the onus of that proof must rest on the defendant. In the present case, the magistrate was entitled to take into consideration the facts proved before him at the earlier hearing. When counsel for the applicant made his statement that the applicant had no assets, the magistrate brought these facts to the attention of counsel who, in his discretion, did not call the applicant or any other evidence. The magistrate had ample evidence before him on which he could issue a warrant to commit the applicant to prison.

Weitzman for the applicant, referring to the statement in the Annual Practice, 1943, at p. 1343, that on May 5, 1939, in *Rex v. Rotherham Licensing Justices* (unrep.) Lord Hewart C.J. had ruled that under the new procedure in certiorari counsel had no right of reply, said that he was not sure whether that was correct.

VISCOUNT CALDECOTE C.J. Under the new procedure in certiorari the court will hear an applicant in reply.

Weitzman replied.

VISCOUNT CALDECOTE C.J. To determine the questions which arise in this case it is necessary to consider the two enactments which have been referred to in argument. Sect. 1, sub-s. 1, of the Criminal Justice Administration Act, 1914, prescribes the procedure which is to be followed where the court has to consider whether a warrant committing the defendant to prison shall be issued forthwith. In the present case, however, the applicant was granted a period of three months in which to pay the penalties imposed on him. That time having elapsed and the penalties not having been paid, the matter falls within s. 1, sub-s. 3, of the Money Payments (Justices Procedure) Act, 1935. The inquiry under that sub-section as to the applicant's means was held on May 29, 1942. It is not suggested that the wrong procedure was adopted, but the applicant's contention is that there was no material on which the magistrate could make the order for the issue of a warrant committing him to prison. It was also argued that the onus of proof was on the prosecution at the

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inquiry to prove that the applicant had at the time of the conviction, or had had since, sufficient means to pay the penalties.

In *Rex v. Woking Justices* (1) it was decided that, where an inquiry as to a defendant's means had been held by justices other than those who had convicted the defendant and there was no evidence before them except that the defendant had no means, they could not make an order for the issue of a warrant committing him to prison. It was sought to justify the making of that order in that case by reference to the gravity of the offence which the defendant had committed, but the court held that that ground was not available to the prosecution. Those are not the facts of the present case. Here the magistrate who conducted the inquiry as to the applicant's means was the magistrate who had convicted the applicant and was a "competent court" within the meaning of s. 15 of the Act of 1935. On the inquiry counsel for the applicant stated, as was set out in the applicant's affidavit, that the applicant was not possessed of any assets immediately before or after his conviction. The magistrate, having heard the evidence given at the earlier hearing, thought it right to put that evidence and his view of it to counsel for the applicant and asked him what he had to say in view of that evidence. Counsel made statements about the applicant's financial position which the magistrate said did not satisfy him, but the applicant did not go into the witness-box and give evidence in answer to the magistrate's comment on the evidence which had been previously given in the proceedings. In the light of those facts it is impossible to say that the magistrate arrived at a conclusion which was in any way improper, if he was entitled, as I think he was, to take into consideration the matters which were elicited at the earlier proceedings. There was, therefore, material on which he could make the order of committal.

We have been pressed with the argument that s. 1, sub-s. 1, of the Criminal Justice Administration Act, 1914, requires evidence to satisfy court that the defendant is possessed of sufficient means to enable him to pay the sum forthwith, but for the reasons which I have mentioned, that is not the sub-section which applies to this case. On the other hand, s. 1, sub-s. 3, of the Act of 1935, does apply to this case and the magistrate seems to me to have complied with its provisions. As to the onus of proof at the inquiry, I do not

accept the argument that the prosecution then had to satisfy the magistrate that the defendant had means, although, as was shown in *Rex v. Woking Justices* (1), if evidence had been given at the inquiry, the magistrate would not have been entitled to disregard it. The application for an order of certiorari must be refused.

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HUMPHREYS J. I am of the same opinion. It has been contended that when a court of summary jurisdiction is holding an inquiry into a defendant's means pursuant to s. 1, sub-s. 3, of the Money Payments (Justices Procedure) Act, 1935, that court is debarred from making any order committing the defendant to prison unless it then has evidence given to satisfy it that the defendant has sufficient means, or had had such means, since the date of the conviction, to enable him to pay the penalty. No section of the Act of 1935 supports that argument. It was contended that we ought to read into the Act of 1935 the provisions of s. 1, sub-s. 1, of the Criminal Justice Administration Act, 1914, but I agree with my Lord that that sub-section refers to the making of an order forthwith at the time of the conviction and not to a case such as the present where the defendant has been allowed time for payment. There are no words in s. 1, sub-s. 3, of the Act of 1935 which indicate that the onus lies on the prosecution to prove that the defendant has or has had means to satisfy the penalty. The applicant was present at the time when the inquiry as to means was held and could have given evidence as to his means if he had desired to do so. It may be that the point which has been argued will arise in some case where the tribunal which holds the inquiry as to means is a different tribunal from that which was sitting at the time of the conviction, but that question does not now arise. Here the same magistrate was sitting on both occasions, and I think it wrong to say that any onus was placed on anybody to prove anything. The words of sub-s. 3 are as general as can be imagined. All that the magistrate was required to do, as a competent court, was to inquire as to the means of the applicant in the presence of the latter, and that he did. In so doing he took into consideration such matters as had been proved before him at the time of the conviction, and, in my view, he was entitled to do so. Throughout the inquiry he would seem to have behaved with

(1) [1942] 2 K. B. 248.

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perfect propriety. He put to counsel, who was asking him not to make an order for committal on the ground that the applicant was without means, the difficulty that he felt, namely, that the evidence which had been given up to that time was all the other way, and he left it to counsel to deal with the matter. In his discretion counsel did not call any evidence on that issue. The magistrate, therefore, was entitled to make the order. I agree with my Lord in the judgment which he has pronounced.

LEWIS J. I agree.

Application refused.

Solicitors for applicant : *Lawrence Barnett & Co.*

Solicitor for respondent : *Treasury Solicitor.*

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FARMER v. LONDON COUNTY COUNCIL.

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May 4.

Master and Servant—Wages—"Standing by" in case of emergency.

In 1926 the plaintiff entered the service of the defendants as a nurse at a mental hospital. By his contract he agreed to be bound by the hospital rules and regulations in force from time to time, which then fixed the maximum "working hours of duty" at ninety-six hours a fortnight, and provided for payment for over-time worked in excess of that maximum. At that date he was required on occasion to return to the hospital at midnight to sleep so as to be ready if required for emergency duty, the period between 9 P.M., when he finished his day shift of duty, and midnight being at his own disposal. The sleeping-in hours of duty after midnight were not reckoned as working hours, nor were they paid for as such unless an emergency arose in which case the period of the emergency counted as working time. In September, 1940, the defendants made a regulation requiring the plaintiff on certain days to "stand by" at the hospital from 9 P.M. to midnight in case an emergency arose in those three hours :—

Held, that these were not "working hours of duty" within the meaning of the contract, and that the plaintiff was not entitled to payment in respect of them unless an emergency occurred in which event he would be paid for the time occupied by the emergency.

APPEAL from Southwark county court.

In 1926 the plaintiff entered the service of the defendants, the London County Council, as a male nurse at a mental hospital, his contract being contained in his application form and the rules, regulations and orders of the defendants incorporated therein and thereafter made from time to time.

By a regulation which was in force at that time it was provided that the non-resident male nursing staff should be divided into two classes. Class A. comprised: "Those male nurses permitted by the defendants to be altogether non-resident," and class B. comprised: "Male nurses permitted by the defendants to be non-resident who may be required, in rotation, to sleep in the institution for stated periods to be fixed by the defendants having regard to the maintenance in the institution at night of a sufficient number of staff available for emergency duty." The plaintiff was included in class B. By two further regulations, which were pleaded by the plaintiff in his particulars of claim: "No. 618: The working hours of duty of the indoor staff (except certain members of the professional, administrative and clerical staff) in the mental health services, who, in the course of their duties, have the care or charge of patients shall be such as may be specified from time to time, provided that the maximum hours shall not be more than ninety-six in any one fortnight." No. 619: "Payment shall be made at the rate of time-and-a-quarter for the first two hours and time-and-a-half thereafter for all overtime worked in excess of ninety-six hours in any one fortnight." Until September, 1940, class B. nurses, having finished their day shift of duty at 9 P.M., were required in rotation to return to the institution at midnight to sleep in, the intervening period of three hours being theirs to dispose of as they liked. On September 10, 1940, a regulation was made by the defendants "requiring resident staff, including those non-resident staff who are performing sleeping-in duty, to stand by in rotation in the institution between the time of the termination of the day shift [9 P.M.] and the normal hour of return of resident staff to the institution at night [midnight]." The appellant claimed overtime pay in respect of this period of three hours, from 9 P.M. to midnight, whether or not an emergency occurred during that time, on the ground that the giving up his three hours of relaxation, coupled with the obligation during those hours of being available for work, made them "working hours of duty" within his contract with the defendants. It was admitted that time spent in response to an emergency call would be working time. The county court judge rejected the claim, and the plaintiff appealed.

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Macaskie K.C. and Moelwyn Hughes for the plaintiff. The

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plaintiff's service after 9 P.M. was really a continuation of his shift. The defendants were at no time, during the regular shift or after 9 P.M., bound to find him work, but they were bound to pay him: *Turner v. Sawdon & Co.* (1). A night watchman is engaged to stand by, and is paid for it. The defendants made the plaintiff's time their time, and during the whole of the three hours from 9 P.M. to midnight he was at their beck and call. No doubt, the plaintiff, by his contract, is bound by the defendants' rules, but that provision can only extend to rules dealing with details. It cannot have contemplated rules which alter, for example, maximum hours of work or the rate of wages.

Valentine Holmes for the defendants. "Working hours" can only mean hours when the plaintiff is working, and there is a difference between "standing by"—i.e., being available for work—and working. The plaintiff, by his contract, is bound by the rule made on September 10, 1940.

Macaskie K.C. replied.

SCOTT L.J. In my opinion, the county court judge was right in holding that the period between 9 P.M. and midnight during which the plaintiff was "standing by" could not be treated as "working hours of duty" within the meaning of the contract between the parties. The plaintiff relied on the two regulations which specified the maximum hours of work at ordinary rates and the rates of overtime pay for duty beyond those maximum hours, but I agree with the submission made by Mr. Holmes on behalf of the defendants that, on the true construction of those regulations, the plaintiff proved no facts on which the county court judge could properly hold that he was entitled to the benefit of the provisions relating to overtime pay. Under the contract the defendants had liberty from time to time to make minor alterations with regard to the method in which their employees were to perform their contracts of service, and it was in exercise of that liberty that they required the plaintiff to "stand by" in the institution for the three hours in question—during which he could go to bed and sleep or do anything else he chose provided that he was available for duty in the case of emergency—without his being entitled to extra remuneration for doing so. If any alteration in the original terms of the contract was involved by the regulation of September 10, 1940, it was covered by the

power given to the defendants by the provision in the contract that the plaintiff's employment should be subject to the orders, regulations, and rules made by the defendants. For these reasons, I am of opinion that the county court judge was right, and that the appeal must be dismissed, with costs.

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MACKINNON L.J. I agree. The plaintiff agreed to serve the defendants as a male nurse in class B. In that capacity he was required to sleep in the institution so as to be available for emergency duty, and at the time of his contracting that meant sleeping in after midnight. It is not suggested that, when so sleeping, he was doing his ninety-six hours ordinary duty or overtime in excess of that period, but it is agreed that, if he was called from his sleep on an emergency, the time spent until the emergency ceased and he could return to bed was treated as within those hours of working duty. In September, 1940, this was altered and the employees who were to sleep at the hospital were required to be in by 9 P.M. This varied the exact nature or period of the duty which the plaintiff undertook to fulfil when he joined the defendants' service, or, perhaps, the duty which he had reason to think he was then undertaking, but when he so joined he agreed to be subject to the standing orders, regulations and rules in force from time to time. There has been a new regulation changing the midnight hour to 9 P.M., but when the plaintiff had to come in at 9 P.M. instead of at midnight his status in regard to remuneration was, I think, unchanged. If an emergency arises at any time after 9 P.M., the period until the emergency finishes will count in his ninety-six hours of ordinary work or for the purpose of payment of overtime, but, if no such emergency arises between 9 P.M. and midnight, no part of that period has to be treated as "working hours of duty" any more than any time spent in bed after midnight had to be so treated. I think, for these reasons, that the learned judge was right, and that the appeal fails.

DU PARCQ L.J. I agree for the reasons which have been stated. This is a question of construction, and I think that the learned judge came to the right conclusion.

Solicitors for plaintiff: *Pattinson & Brewer, for Booth & Booth, Manchester.*

Solicitor for defendants: *J. R. Howard Roberts.*

W. L. L. B.

C. A.

SAMUELS v. DAVIS.

1943

Apr. 12.

Dentist—Contract—Supply of denture—Fitness for the purpose for which supplied—Implied warranty.

When a dentist undertakes for reward to make a denture for a patient a term is to be implied in the contract between the parties that, if given reasonable co-operation by the patient, the dentist will supply to the patient a denture which is reasonably fit for the purpose for which it is intended, whether the contract be regarded as one for the sale of goods or as one to perform work and supply materials.

APPEAL from Exeter county court.

The plaintiff, Edgar Samuels, a registered dental surgeon, claimed from the defendant, C. H. Davis, the sum of twelve guineas for making a denture for the defendant's wife. The defendant accepted responsibility, but disputed the claim on the ground that the denture was so unsatisfactory that his wife was unable to use it; that the contract between him and the plaintiff was for the sale of goods, within the meaning of s. 14 of the Sale of Goods Act, 1893, or alternatively for work done and materials supplied; and that, in either case, there was an implied condition that the denture should be reasonably fit for the purpose for which it was supplied. The county court judge acquitted the plaintiff of negligence or lack of skill, but found that the denture was not reasonably fit for the use of the defendant's wife. He thought that the contract between the parties was one for the sale of goods, and that he was bound by the decision in *Lee v. Griffin* (1), but if it was for the performance of services and the supply of materials, there was nevertheless an implied condition that the denture should be reasonably fit for the purpose for which it was supplied, and the plaintiff was in breach of that implied condition. He, therefore, gave judgment for the defendant, and the plaintiff appealed.

Havers K.C. and *A. A. Pereira* for the plaintiff. The main purpose of the appeal is to enable the decision in *Lee v. Griffin* (1), by which the judge below thought himself bound, to be reconsidered by this court in the light of the higher status which the profession of dental surgery has attained in recent years. It is submitted that a dentist is entitled to be treated as on the same footing as a physician or surgeon and

as only warranting that materials used by him are of good quality and that work done by him will be carried out with reasonable skill and care. The contract between the parties here was one for professional work and labour and materials to be supplied. The plaintiff did not guarantee that the patient would be able to use the denture, any more than a surgeon, who performs an operation on a patient's leg, guarantees that he will be able to walk with an artificial limb, or than a physician guarantees that his treatment will effect a cure. [They referred to *G. H. Myers & Co. v. Brent Cross Service Co.* (1) ; *Robinson v. Graves* (2) ; and *Clay v. Yates* (3).]

Laskey and *G. A. Russo*, for the defendant, were not called on to argue.

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SCOTT L.J. This appeal is important in some aspects, but we are quite clear what the position is in this court in view of the findings, on sufficient evidence, by the county court judge that there was a breach of the implied condition that the denture should be reasonably fit for the purpose for which it was supplied, whether the contract was for the sale of goods, as the judge thought, or for services rendered.

In my view, it is a matter of legal indifference whether the contract was one for the sale of goods or one of service to do work and supply materials. In either case, the contract must necessarily, by reason of the relationship between the parties, and the purpose for which the contract was entered into, import a term that, given reasonable co-operation by the patient, the dentist would achieve reasonable success in his work, or, in other words, that he would produce a denture which could be used by the patient for the purpose of eating and talking in the ordinary way. I appreciate that, in doing work of that kind, a dentist must rely greatly on the active assistance, co-operation and patience of the patient. A good patient helps a good dentist enormously in the success of his work. On the other hand, if a patient makes it impossible for the dentist to complete his work successfully, the fault must rest with the patient and leave the dentist entitled to recover the agreed remuneration for the work which he has done, or would have done, but for the failure of co-operation on the part of the patient. In this case, however, there is no issue on this point.

(1) [1934] 1 K. B. 46.

(3) (1856) 1 H. & N. 73.

(2) [1935] 1 K. B. 579.

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Mr. Havers, on behalf of the plaintiff, was anxious to establish that the contract was not a contract for the sale of goods into which must be imported the condition imposed by s. 14 of the Sale of Goods Act, 1893, but was a contract for work and materials. For the reasons I have already given, I cannot see that that distinction has any importance in a contract of this type, and, as it is not necessary in deciding this appeal to express any final view on the subject of where to draw the line between a contract of sale and a contract for work and materials, I think it wiser to avoid saying anything on that general topic. Mr. Havers took us through a series of cases, beginning with *Lee v. Griffin* (1), which has been considered a good deal. There the court discussed the difference between a contract for the sale of goods and one for work and materials, and expressed their view, through the mouth of Blackburn J., that in all cases to ascertain whether the cause of action is for goods sold and delivered, or for work and labour done and materials provided, the particular contract entered into between the parties must be regarded. I may leave that topic at that. The series of cases cited by Mr. Havers ended with *Myers & Co. v. Brent Cross Service Co.* (2), which came before a Divisional Court, on appeal from the county court. du Parc J. gave an illuminating judgment, in which he considered the previous cases, and I agree with what he then said in that judgment, but, in essence, this appeal must be dismissed because the learned judge found as a fact that the dentures were not reasonably fit for the purpose for which they were intended. He having decided against the plaintiff on the facts, and there being no error of law in his judgment, the appeal must be dismissed, with costs.

DU PARCQ L.J. I agree. I have no doubt that it is impossible for this court to interfere with the learned judge's decision. Indeed, assuming that he came to a right conclusion on the facts, as I am very willing to assume, although my opinion about them would in any event be of no importance, I think he could not, in law, have given any other judgment. He considered whether this contract was for the sale of goods or to do work and labour. I agree with my Lord in thinking that it makes no difference which it was. For my own part, I think that it was a contract for the sale of goods. *Lee v. Griffin* (1) dealt with s. 17 of the Statute of Frauds, now

(1) 1 B. & S. 272.

(2) [1934] 1 K. B. 46.

re-enacted in s. 4 of the Sale of Goods Act, 1893, and, if I may give a word of advice to the dental profession, I would suggest to them that in all their dealings they assume that a contract under which they are to supply a denture, is, for the purposes of that section, a sale of goods. They may run risks if they assume that it is a contract for work and labour and that no writing is necessary. That, however, is by the way, because we are concerned with an entirely different problem here. In *Lee v. Griffin* (1) the court was not directing its attention to the question whether there were any incidents in the case of a contract for the sale of a denture which were different from those in the case of a contract for the work and labour expended on the making of a denture. I have no doubt that, if the question had arisen for decision, whether it made any difference whether the contract was described as one of sale or one of work and labour, the answer for the present purpose would have been: "None whatever."

In *Francis v. Cockrell* (2), which was cited in *G. H. Myers v. Brent Cross Service Co.* (3), Kelly C. B. said: "I do not hesitate to say that I am clearly of opinion, as a general proposition of law, that when one man engages with another to supply him with a particular article or thing, to be applied to a certain use and purpose, in consideration of a pecuniary payment, he enters into an implied contract that the article or thing shall be reasonably fit for the purpose for which it is to be used and to which it is to be applied." The learned chief baron was there dealing with a case, which, as I pointed out in my judgment in *Myers v. Brent Cross Service Co.* (3), was not one of a sale of goods at all, and his words were of general application to all contracts under which goods were supplied. It may be that there are exceptions to that general proposition as laid down by the learned chief baron, and I think that he had it in his mind that there might be, because he said: "I hold this to be a general proposition of law applying to all contracts of this nature and character." I cannot doubt that, if someone goes to a professional man, however eminent, and whatever skill the practice of his profession may demand, and says: "Will you make me something which will fit a particular part of my body?" as everybody does say impliedly who asks that a denture may be made, and the professional gentleman says: "Yes," without qualification, he

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(1) 1 B. & S. 272.*

(3) [1934] 1 K. B. 46.

(2) (1870) L. R. 5 Q. B. 501.

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is then warranting that when he has made the article it will fit the part of the body in question. I think one is getting into a region of fancy if one assumes that any other contract is made by implication. Of course, there are many cases where no professional man would make such a contract, but in those cases he would undoubtedly make an express contract limiting his liability. In the ordinary case, where a dental surgeon is instructed for reward to make a denture, I have not the faintest doubt that, whether the contract be regarded as one for the sale of goods or one for work and labour done, the dentist is contracting to make a denture which will fit the patient's mouth. It does not help to consider cases of an artist painting a picture or a sculptor making a bust, or to refer to cases of surgical operations in the ordinary sense. Clearly a dentist is in the same position as any other surgeon from the point of view of the law. If a dentist takes out a tooth or a surgeon removes an appendix, he is bound to take reasonable care and to show such skill as may be expected from a qualified practitioner. The case is entirely different where a chattel is ultimately to be delivered.

There is no doubt that, if a patient refuses to co-operate with the dentist and makes his task impossible, the dentist is entitled to treat the contract as repudiated and to claim damages. A patient may repudiate the contract by his behaviour, and the dentist can accept the repudiation. Nothing of the kind occurred here. On the contrary, the plaintiff claimed that he had done the work satisfactorily and that the patient had no legitimate complaint. The learned judge found that the plaintiff was wrong. It is clear that the denture was not fit for the purpose for which it was made, and I agree that there is no ground for disturbing any part of the judgment of the learned judge and that this appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Le Brasseur & Oakley.*

Solicitors for defendant: *Lawrence Jones & Co., for Hill & Coxe, Budleigh Salterton.*

A. W. G.

COE v. LONDON AND NORTH EASTERN RAILWAY COMPANY.

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1943

Apr. 5, 6,
20.

Negligence—Certified scheme under Workmen's Compensation Acts—Exercise by workman of option to proceed independently of Acts—Provision in scheme that compensation in claim under Employers' Liability Act, 1880, or at common law, to be that provided by scheme—Validity—Scope of scheme—Action by widow of workman under Fatal Accidents Acts and Employers' Liability Act, 1880—Liability of employers—Workmen's Compensation Act, 1925 (15 & 16 Geo. 5, c. 84), s. 29, sub-s. 1; s. 31, sub-s. 1.

A locomotive driver employed by the defendant railway company died as the result of a collision between two trains which was caused by the negligence of another servant of the company. The deceased workman had, since entering the company's service as a boy, been a subscribing member of a scheme known as the Great Eastern Railway Accident Fund, which had been certified by the Registrar of Friendly Societies within the meaning of s. 31, sub-s. 1, of the Workmen's Compensation Act, 1925. The form of application for membership of the scheme, signed by the workman, contained the following conditions: "A. That the provisions of the said scheme shall be substituted for the provisions of the Workmen's Compensation Act, 1906, as regards any claims which I or any persons claiming under me or my dependants may have for compensation under the said Act. B. That in any case in which I or persons claiming under me make any claim under or by reason of the provisions of the Employers' Liability Act, 1880, or any Act or Acts amending the same, or at common law, I will accept the contribution agreed to be made by the railway company under the said scheme, and any compensation or provision which may be allotted to me under the said scheme, in satisfaction of any such claim so made by me or persons claiming under me as aforesaid." In an action by the widow of the workman for damages under the Fatal Accidents Acts and the Employers' Liability Act, 1880, the county court judge held that, while the workman had not contracted himself out of his statutory or common law rights, he had, by joining the scheme, exercised the option either to claim compensation under the Workmen's Compensation Acts or to take proceedings independently thereof given him by s. 1, sub-s. 2 (b), of the Workmen's Compensation Act, 1906 (now s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925), and, therefore, that the claim of the widow was barred. On appeal:—

Held, that the widow was entitled to recover because (per Scott L.J.) the contract by the workman that the provisions of the scheme should be substituted for those of the Workmen's Compensation Acts was not an exercise of the option, and, the provisions of cl. (B) being inconsistent with the terms of membership of the scheme which it was the duty of the company under the

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Workmen's Compensation Acts to offer to the workman, the clause was a nullity; and (per du Parcq L.J.) a scheme under the Acts is designed to replace the Acts within the limit within which they operate and so it does not affect the civil liability of the employer, and, further, even assuming that a workman, when invited to adhere to a certified scheme, could lawfully be required to contract out of his rights at common law and under the Employers' Liability Act, in the present case the workman, notwithstanding cl. (B), had retained his right both to maintain an action and to recover damages.

Taylor v. Hamstead Colliery Co. [1904] 1 K. B. 838, doubted and distinguished.

APPEAL from Brentwood county court.

The plaintiff, Mrs. Kate Louisa Coe, widow of the workman, Basil William Coe, a locomotive driver, claimed from the defendants, the London and North Eastern Railway Company, damages under the Fatal Accidents Acts, 1846 to 1908 (as amended by the Law Reform (Miscellaneous Provisions) Act, 1934, s. 2, sub-s. 3), and the Employers' Liability Act, 1880. On February 10, 1941, the workman was travelling, in the course of his work, in a passenger train belonging to the defendant company on a track between Harold Wood and Brentwood. While the train was stationary, another train, which was being driven by a servant of the defendant company and had been following along the same track, was caused, by the negligence of its driver, to collide with the rear part of the stationary train, and the workman suffered injuries from which he died. At the material time there was in existence a scheme, properly certified by the Registrar of Friendly Societies, within the meaning of s. 31, sub-s. 1, of the Workmen's Compensation Act, 1925, known as the Great Eastern Railway Accident Fund, and the workman, since entering the company's service as a "call boy" in 1909, had been a member of that scheme, and had regularly paid his subscription thereto of one penny per week. The form of application for membership of the scheme, which was signed by the workman, contained the following conditions: "(A) 'That the provisions of the said scheme shall be substituted 'for the provisions of the Workmen's Compensation Act, '1906, as regards any claims which I or any persons claiming 'under me or my dependants may have for compensation 'under the said Act. (B) That in any case in which I or 'persons claiming under me make any claim under or by reason 'of the provisions of the Employers' Liability Act, 1880,

"or any Act or Acts amending the same, or at common law, "I will accept the contribution agreed to be made by the "railway company under the said scheme, and any compensation or provision which may be allotted to me under the "said scheme, in satisfaction of any such claim so made by "me or persons claiming under me as aforesaid." It was stated that under the scheme the amount which would be paid was 300*l.*, whereas under the Employers' Liability Act the agreed amount of compensation was 885*l.* The defendant company contended that the workman had contracted himself out of his common law or statutory rights, and that, as at the time of his death he had no right to maintain an action and recover damages, his widow, who claimed under him, could not recover damages. The county court judge held that the deceased had not contracted himself out of his rights under the Employers' Liability Act, or at common law, but had merely agreed to accept as the basis of compensation the amount to which he would be entitled under the scheme, but he was of opinion that the decision of the Court of Appeal in *Taylor v. Hamstead Colliery Co.* (1), by which he felt himself bound, barred the plaintiff's claim under the Employers' Liability Act. The plaintiff appealed and the defendants cross-appealed.

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Beney for plaintiff. The county court judge was wrong in holding that the plaintiff's claim under the Fatal Accidents Acts and the Employers' Liability Act, 1880, in respect of the death of her husband, was barred by reason of her husband's membership of the scheme. By s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925 (2), a workman who

(1) [1904] 1 K. B. 838.

(2) By Workmen's Compensation Act, 1925, s. 29, sub-s. 1: "When the injury was caused by "the personal negligence or wilful "act of the employer or of some "person for whose act or default the "employer is responsible, nothing "in this Act shall affect any civil "liability of the employer, but in "that case the workman may, at "his option, either claim compensation under this Act or take "proceedings independently of this "Act;"

Sect. 31, sub-s. 1: "If the "Registrar of Friendly Societies "after taking steps to ascertain "the views of the employer and "workmen, certifies—(a) that any "scheme of compensation, benefit "or insurance for the workmen of "an employer in any employment, "whether or not such scheme "includes other employers and "their workmen, provides scales "of compensation not less favourable to the workmen and their "dependants than the corresponding scales contained in this Act

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is injured through the negligence of a person for whose act or default the employer is responsible can, at his option, claim compensation either under the Act or independently of the Act, but the section expressly provides that in such a case nothing in the Act shall affect the civil liability of the employer. If, by joining the scheme, the workman elected to forgo his rights under the Employers' Liability Act, 1880, and at common law, that would be contrary to the express provision of s. 29, sub-s. 1. By joining the scheme the workman merely barred himself from recovering compensation under the Employers' Liability Act, 1880. He did not bar himself from making a claim under the Act, and did not prevent his widow or dependants from making such a claim and recovering damages. In *Kinneil Cannel and Coking Coal Co. v. Waddell* (1), it was held by the House of Lords that where a workman has been fatally injured the right to compensation under the Act vests in his dependants, not as a body, but as individuals, and that arbitration proceedings taken by a dependant stepson of the deceased workman against the employers was no bar under s. 29, sub-s. 1, to a common law action against them by the widow. "The claims of the "widow and children of proceeding at common law cannot be "defeated by the act of somebody to whom the common law "remedy is not open": per Lord Buckmaster (2). That decision was followed and applied in *Avery v. London and North Eastern Ry. Co.* (3). The remedy given by the Fatal Accidents Act, 1846, has been held to be a new and personal remedy given to the dependants named in the Act, each of whom has the right to choose whether he will claim compensation under the Act, or independently of it. In *Nunan v. Southern Ry. Co.* (4) it was held that where a passenger by railway who has agreed with the railway company that their liability for personal injury shall not exceed a certain sum is killed by the negligence of the company's servants, the damages recoverable by his dependants in an action under the

" . . . (c) that a majority (to
"be ascertained by ballot) of the
"workmen to whom the scheme
"is applicable are in favour of
"such scheme; the employer
"may, whilst the scheme is in
"force, contract with any of his
"workmen that the provisions of
"the scheme shall be substituted

"for the provisions of this Act,
"and thereupon the employer shall
"be liable in respect of those
"workmen only in accordance
"with the scheme."

(1) [1931] A. C. 575.

(2) Ibid. 580.

(3) [1938] A. C. 606.

(4) [1924] 1 K. B. 223.

Fatal Accidents Act, 1846, are not limited to the agreed sum. On the facts, *Taylor v. Hamstead Colliery Co.* (1), by the decision in which case the county court judge considered himself to be bound, is distinguishable from the present case. The scheme there contained a clause that "the contributions made by the employers to this society are to be, in lieu of, and to exempt them from, any further claims which otherwise the members of this society may be entitled to prosecute as the result of accidents occurring during their employment" (2). This provision was not brought to the notice of the county court judge. The scheme in the present case contains no such provision. The decision in *Taylor v. Hamstead Colliery Co.* (1), was correct on the facts of that case, but if it is construed as having a wider effect it is contrary to the decisions of the House of Lords.

Lynskey K.C. and *Gerald Howard* for the defendants. The county court judge was right in applying the decision in *Taylor v. Hamstead Colliery Co.* (1) to the facts of the present case. Where a scheme for compensation exists, the employer is liable to those of his workmen who have joined the scheme, or to their dependants, only in accordance with the scheme, and he is not liable to pay statutory compensation. The scheme to which the deceased workman belonged substituted the benefits provided by the scheme for any claims for compensation by the workman at common law or by statute. Before any claim for compensation under the Employers' Liability Act can be made successfully, two conditions must be fulfilled: (1.) that the person claiming compensation has the right to claim, and (2.) that he has the right to recover damages. Under the scheme the right to recover damages under the Act has entirely gone and a right to receive the benefits under the scheme is substituted therefor. Sect. 1, sub-s. 3, of the Workmen's Compensation Act, 1925, expressly provides that "where under this Act the provisions of a scheme are substituted for the provisions of this Act, the employer shall only be liable in accordance with the scheme." That is made clear by s. 31, sub-s. 1. No mention is made of a scheme in s. 29, and the effect of a scheme is to abolish any statutory right of election as to the remedy open to the workman. In *Taylor v. Hamstead Colliery Co.* (1) it was decided that a scheme, which was substantially the same as that in the present case, had been substituted for the

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(1) [1904] 1 K. B. 838.

(2) (1904) 20 T. L. R. 338.

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rights of the workman under the Act and at common law, so that the employer was only liable in accordance with the scheme. That decision is a binding authority in the present case: see also Willis's Workmen's Compensation, 38th ed., p. 545. *Kinneil Cannel and Coking Coal Co. v. Waddell* (1) has no application here. That decision was purely as to the right of a dependant to exercise an independent right of election, a question which only arises after it has been decided that there is a right to take proceedings under the Employers' Liability Act or at common law. [DU PARCQ L.J. I do not think Parliament intended that when an employer made a contract with his workmen under s. 31, he should be able to insert an entirely new condition.] The court will appreciate that not only have these schemes to be approved by the Registrar of Friendly Societies, but also to be passed by ballot of the workmen. There can be no question of duress. The workmen have the advice and assistance of a powerful trade union.

Beney, in reply. It would be remarkable if rights expressly preserved to the workman under s. 29, sub-s. 1, were held to be taken away by a scheme coming into force under s. 31, sub-s. 1. If an employer desires to exempt himself from liability for the negligence of himself or his servant he must do so in plain and unambiguous terms: see per Walton J. in *Price v. Union Lighterage Co.* (2).

Cur. adv. vult.

Apr. 20. The following judgments were read.

SCOTT L.J. This is an appeal from His Honour Judge Hunter, sitting in the Ilford county court, by the widow of a locomotive driver in the employment of the defendant company. His death was caused in February, 1941, by an accident which arose out of and in the course of his employment, and his widow sued for damages under the Fatal Accidents Acts and the Employers' Liability Act, 1880. The learned judge assessed the damages due to her at 885*l.*, but, purporting to act on the authority of the decision of this court in *Taylor v. Hamstead Colliery Co.* (3), held that, though she was not debarred from making such a claim, her right by her claim to recover any damages under that Act had been excluded

(1) [1931] A. C. 575.

(3) [1904] 1 K. B. 838.

(2) [1903] 1 K. B. 750, 752.

by the act of her late husband in joining a scheme certified by the Registrar of Friendly Societies under s. 31 of the Workmen's Compensation Act, 1925. He, accordingly, gave judgment for the defendant company, with costs. So far as concerns any issue to be decided in this appeal, I do not think that there is any material difference between s. 3, sub-s. 1, of the Act of 1897, s. 3, sub-s. 1, of the Act of 1906 (under which the scheme joined by the deceased in 1909 was probably certified), and s. 31 of the Act of 1925. There is equal similarity between s. 29, sub-s. 1, of the Act of 1925 and s. 1, sub-s. 2 (b) of the Act of 1897, and s. 1, sub-s. 2 (b) of the Act of 1906, which preserve to the workman an option to recover damages at law if he can, instead of enforcing his right to workmen's compensation.

The Court of Appeal decided in *Taylor v. Hamstead Colliery Co.* (1), that the workman in that case, by the act of joining the scheme under s. 3, sub-s. 1, of the Act of 1897, had then and there exercised the option between his common law right of action for damages and his right to workmen's compensation, which had been given him by the Workmen's Compensation Act, 1897, s. 1, sub-s. 2 (b), and thereby had elected to rely exclusively on his workmen's compensation rights, whether based directly on the Act or indirectly on it through the scheme he had joined, and, accordingly, had irrevocably waived his rights of action under the Employers' Liability Act, 1880, or at common law. The court further decided that this waiver of his personal rights had the effect, in the event of his death, of barring the rights of his dependants, on the ground that persons "claiming through" the deceased workman were "equally debarred from taking proceedings "independently of the Act." There was no reference in the judgment to s. 7, sub-s. 2, of the Act of 1897 which provides that any reference to a workman shall include: "a reference "to his legal personal representative or to his dependants, or "other person to whom compensation is payable." That provision was repeated in the Act of 1906 (s. 13), and again in s. 48, sub-s. 3, of the Act of 1925. The decision seems, therefore, to have been based purely on the views taken of the combined effect of s. 1, sub-s. 2 (b), and s. 3.

Apart from the scheme, that is to say, if there had been no scheme, but the deceased had made an agreement with the company outside a scheme as to some pecuniary limit to his

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own right to damages at common law or under the Employers' Liability Act, the decision of this court in *Nunan v. Southern Railway Co.* (1) is authority binding on us that such a contract with the company to limit the amount of damages for injury to himself would not have impaired the right of the workman's dependants to sue in respect of his death or affected the amount of damages which they could recover. So, too, the decision in *Kinneil Cannel & Coking Coal Co. v. Waddell* (2) is clear that recovery of compensation in proceedings under the Workmen's Compensation Act by one dependant within the meaning of that Act still leaves the employer liable to other dependants who sue at common law, but neither decision quite disposes of the present appeal, although they afford help in the solution of its problems.

The facts and scheme in the present case are sufficiently similar to the facts and scheme in *Taylor v. Hamstead Colliery Co.* (3) to make it necessary to analyse that decision with care as well as to see whether there are any material differences in the facts. I confess to feeling some difficulty in being sure about the real decision there, and still more as to the grounds of the decision. I could understand an argument for the employer based on the contention that s. 3 of the Act of 1897 authorized a scheme which could impose on the workman who joined it a final abandonment of all his own rights of action at law and that the scheme in a particular case did so, although I should, if I am free to do so, certainly disagree with such an interpretation of the section and probably also with such an interpretation of the scheme in *Taylor v. Hamstead Colliery Co.* (3) (so far as it is reported), but I cannot understand how a scheme under the Acts could be construed as an exercise of the option deliberately kept open by Parliament in s. 29, sub-s. 1, of the Act of 1925 and its predecessors in the Acts of 1897 and 1906.

It is important to see what was decided. The headnote summarizes the case as deciding in effect that the acceptance by a workman of a scheme under the Act operates as an exercise of the option given to him by s. 1, sub-s. 2 (b), to choose between workmen's compensation and damages at law, and that such final exercise also debars his dependants from proceedings at law. The judgments were extemporary, and they do not seem to me to proceed wholly on one and the

(1) [1924] 1 K. B. 223.

(2) [1931] A. C. 575.

(3) [1904] 1 K. B. 838.

same ground. Mathew L.J. says (1) in terms that the workman by joining the scheme exercised his statutory election under s. 1, sub-s. 2 (b), of the Act of 1897, meaning that he waived his right to damages at law. Collins M.R., I think, says the same thing (2). Romer L.J. may mean the same thing when he says (3) that a "workman [who has joined a scheme] "and those claiming through him are in the same position "as if he or they had taken advantage of the provisions "for compensation provided by the Workmen's Compensation "Act." The Master of the Rolls, however, also rested his judgment on a quite different ground, namely, that the word "only" in the sentence contained in s. 3, sub-s. 1, "and thereupon the employer shall be liable only in accordance "with the scheme"—should, in his opinion, be construed as meaning "and shall not be liable to the employee in any "action for damages at law," whereas, in my respectful opinion, it means merely that the employer's liability should be only contractual under the scheme and not statutory under the Compensation Act. That interpretation by the Master of the Rolls of those words necessarily imports that the "scheme" section in each of the three Acts (which is the only permission of contracting out anywhere in the Acts) enables the employer to obtain complete freedom from liability to proceedings at law for damages for negligence, not only at the instance of the workman, but also, on his death, at the instance of his dependants. Lord Atkin, when a judge of the King's Bench, expressed the same view, obiter, in *Codling v. John Mowlem & Co., Ltd.* (4) and, when a lord justice, in *Bennett v. L. & W. Whitehead* (5), but his view was expressly disapproved by the House of Lords in *Kinneil Cannel and Coking Coal Co. v. Waddell*: see per Lord Buckmaster (6). How far the learned Master of the Rolls in *Taylor v. Hamstead Colliery Co.* (7) was basing his judgment on that ground, and how far on the supposed exercise by the workman of his statutory option, it is impossible to say, but I humbly conceive that the above point, even by itself, to some extent shakes *Taylor v. Hamstead Colliery Co.* (7) as an authority binding on this court.

But that is not the only point on which subsequent expressions of superior judicial opinion are inconsistent with the

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(1) [1904] 1 K. B. 838, 845.

(2) Ibid. 846.

(3) Ibid. 846.

(4) [1914] 2 K. B. 61, 69.

(5) [1926] 2 K. B. 380, 409.

(6) [1931] A. C. 575, 581.

(7) [1904] 1 K. B. 838.

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reasoning of *Taylor v. Hamstead Colliery Co.* (1). I think its main ratio decidendi, that a workman who joined an authorized "scheme" elected under the option section to give up his common law rights and thereby to free the employer from that liability is opposed to higher authority enunciated since 1904. Before referring to the decisions, and assuming my freedom, I will state the difficulty which I feel in accepting the *Taylor v. Hamstead Colliery Co.* (1) view that the acceptance by a workman of a "scheme" constitutes ipso facto an exercise of the option given him by each of the Acts. That option is, beyond doubt, a legal right of election, and no election can be exercised by the elector without full knowledge of all material facts affecting his choice. Under s. 1, sub-s. 2 (b), of the Act of 1897, or s. 29 of the present Act, he must know the circumstances and nature of the accident, of its cause, and of the facts indicating the presence or absence of such negligence as would tend to permit or prevent a successful action against the employer for damages as well as of the facts affecting the alternative right of claiming workmen's compensation, whether under the Act or under a scheme substituted for the Act. These considerations apply with equal or even greater force to an election by the workman which is to bind his dependants in the case of his death, not only in view of the greater pecuniary stake at issue, but also because it is a man's moral duty to take more unselfish interest in their welfare than in his own. It is worth noting that the right of election conferred by s. 29 is solely in favour of the workman, and the legislature must be taken to have realized that election can only be made in the light of full knowledge of the relevant facts. That it did realize it appears from its allowing the workman, if he makes a mistake about his facts and fails in an action at law, a locus pœnitentiæ in the provision of s. 29, sub-s. 2, which forgives his mistake by suspending his final election till by his failure he has learnt the real facts. In view of the precise and definite language of s. 29, and its predecessors in 1897 and 1906, I find it impossible to suppose that Parliament intended to impose on the living workman the duty of deciding in advance, when perhaps he is not yet married, whether his future wife and children should, as dependants, in the event of his death by accident, make their claim under the Workmen's Compensation legislation for compensation or outside it for damages at law. Very clear

(1) [1904] 1 K. B. 838.

language would be needed to justify the inference that Parliament had any such unreasonable intention, and, in truth, the language used appears to me wholly inapt for such an interpretation.

The same sort of point on ambiguity of language arose for consideration in *Lysons v. Andrew Knowles & Sons, Ltd.*, and *Stuart v. Nixon & Bruce* (1). The Court of Appeal had decided that, as the quantum of compensation in the Act of 1897 was based on "an average of weekly wages," casual labourers employed for any period less than two weeks could have no "average weekly wages" and were, therefore, outside the Act altogether. The House of Lords reversed the Court of Appeal, and one ground was that the phrase in question was wholly insufficient to carry so heavy a burden of implied meaning as to deprive the workman of rights given elsewhere in the Act. So here, as it seems to me, much more explicit language in the Act would have been necessary to carry the burden of the decision in *Taylor v. Hamstead Colliery Co.* (2). If the decision was right, it meant that the young "call boy" who joined the company's scheme in 1909 was thereby committed to an election which deprived his future widow, in 1941, of her independent statutory right to claim damages at law. The authority of *Taylor v. Hamstead Colliery Co.* (2) is, on this ground also, in my opinion, shaken.

Finally, I regard as impossible the basic conception on which *Taylor v. Hamstead Colliery Co.* (2) was decided, namely, that the decision of a workman to join a contractual scheme for compensation in substitution for a statutory system equally for compensation could operate as an election then and there to abandon (at least for the duration of his membership of the scheme) all his own rights of action for damages. Since the option conferred by the Workmen's Compensation Acts is truly a right of election, it must be subject to all the legal characteristics inherent in the exercise of that right. First and foremost is the requisite condition that the elector should be in possession of such knowledge of the material facts as will enable him (possibly with the help of legal advice) to make an effective comparison of the probable results to himself of his choosing the one course rather than the other, so open to him. This legal principle is common to many legal acts which involve election. "Waiver" is one. The much criticized maxim that "a man cannot both approbate and reprobate" rests on,

(1) [1901] A. C. 79.

(2) [1904] 1 K. B. 838.

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or, at least, involves the same principle of election. Ratification is another such act. Affirmation of a voidable contract is another, and, finally, the equitable doctrine of election affords a particularly clear illustration. In all these cases sufficient knowledge to permit of a real election made with understanding is a condition precedent to a legally effective exercise of the right.

In *Fuller's Theatre & Vaudeville Co. v. Roze* (1), Lord Atkinson, delivering the judgment of the Privy Council on a question of waiver, said: "In *Matthews v. Smallwood* (2), "Parker J. laid down, in terms which have often since been "approved of, the law upon this question of waiver with his "accustomed clearness and accuracy. 'Waiver,' he said, "'of a right of re-entry can only occur where the lessor, with "'knowledge of the facts upon which his right to re-enter "'arises, does some unequivocal act recognizing the con- "tinued existence of the lease. It is not enough that he "should do the act which recognizes, or appears to recognize, "the continued existence of the lease, unless, at the time "when the act is done, he has knowledge of the facts under "which, or from which, his right of entry arose.'" In *Lissenden v. C. A. V. Bosch, Ltd.* (3), Lord Maugham distinguished a common law election between remedies and an election in equity between rights, and, in speaking of equitable election, said: "In the fourth place, no person is taken to "have made an election until he has had an opportunity of "ascertaining his rights, and is aware of their nature and "extent. Election, in other words, being an equitable "doctrine, is a question of intention based on knowledge." The election conferred by s. 29 is, indeed, something more than a choice of remedies. It is in some degree a choice of rights because of the differences in the amounts recoverable, but, whether that be true or not, I think that Lord Maugham's "fourth" principle applies to such an election as is given by s. 29. In *United Australia, Ltd. v. Barclays Bank, Ltd.* (4), Lord Atkin, said: "On the other hand, if a man is entitled "to one of two inconsistent rights it is fitting that when with "full knowledge he has done an unequivocal act showing that "he has chosen the one he cannot afterwards pursue the other, "which after the first choice is by reason of the inconsistency "no longer his to choose." These authorities appear to me

(1) [1923] A. C. 443.

(2) [1910] 1 Ch. 786.

(3) [1940] A. C. 413, 418, 419.

(4) [1941] A. C. 30.

to be conclusive that the acceptance by a workman of a scheme under s. 31 cannot in law be an exercise of the option given him by s. 29.

Now, the most fundamental feature of the Workmen's Compensation legislation is its prohibition of contracting out—undoubtedly enacted as a special protection to the workman. The one exception to that prohibition is s. 31, and there great pains were taken by Parliament to make the contractual alternative at least as favourable to the workman as the statutory system. But it seem to me—and I say so with great respect to the court in *Taylor v. Hamstead Colliery Co.* (1)—that when the rights and remedies of a workman had become, by his joining the scheme, purely contractual, it was wrong to say, as Lord Collins M.R. says, that when the workman seeks to enforce the provisions of the scheme he does so “under the Act,” and equally wrong to say that “the workman by his assent to the scheme, which assent is binding on his representatives, has placed them in the same position as if they were claiming compensation under the Act” (2). Romer L.J. repeats the same view (3). The claim was a claim under the contract, and not a claim to enforce a statutory right.

If that be so, it would seem at first sight that the next step is to consider the scheme itself in the present case, but, as the scheme certainly contains no clear words excluding the dependants' right to claim, it is more convenient to consider first what the section intends it to contain. Sect. 31 has one object and, as I think, one object only, namely, to permit the translation into contractual rights and obligations of the statutory rights and duties relating to workmen's compensation contained in the Workmen's Compensation Acts and so to effect a change from status to contract without any change of content (except in favour of the workman). The section contains no provision which, directly or indirectly, requires a workman to surrender in advance, on behalf of himself or his representatives or dependants, any right of action for damages, and I think it would be wrong, and, indeed, ultra vires the registrar to pass a scheme which did so. In case of ambiguity in that respect contained in the scheme, it should be resolved against the employer both because that is, in my opinion, the meaning of the Act and on the principle of contra proferentem. In short, a scheme which is truly within the Act does not

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(1) [1904] 1 K. B. 838. (3) Ibid. 846.

(2) Ibid. 845, 846.

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exclude the independent right of dependants to sue for damages, and, in my opinion, the Act prohibits the insertion of such a provision in the scheme.

I now turn to the scheme, rules and application in the present case. The application is a separate document which was signed by both parties and thus became a written contract. It constituted membership for the deceased, but also contains further terms. Neither the rules nor the form of application is any part of the scheme. The signed contract has had and could have no certification by the registrar, but it contains cl. (B) on which Mr. Lynskey relied as an alternative ground for dismissing the appeal. The form begins, properly enough: "I desire to become a member of the Great Eastern Railway Accident Fund upon the terms of the scheme certified by the Registrar of Friendly Societies, and I authorize the deduction from my wages of one penny per week as my contribution to the said fund," but it goes on: "and I agree with the London and North Eastern Railway Company as follows." Then, after a perfectly proper clause marked (A), it continues: "(B). That in any case in which I or persons claiming under me make any claims under or by reason of the provisions of the Employers' Liability Act, 1880, or any Act or Acts amending the same, or at common law, I will accept the contribution agreed to be made by the railway company under the said scheme and any compensation or provision which may be allotted to me under the said scheme in satisfaction of any such claim so made by me or persons claiming under me as aforesaid." It was then countersigned on behalf of the railway company so as to turn it into a bilateral written contract with the company.

The first question to decide is the meaning of cl. (B). Apart from the particular aspect of its effect on the rights of dependants in case of the death of the signatory by an accident within the purview of its provisions, it plainly does not exclude the making of a claim on behalf of the member by an action at law for damages, for it assumes that such a claim can and will be made. It, therefore, does not in terms purport to make the signatory himself abandon his right of action, still less to free the employer from such liability. Mr. Beney, on this footing, argued that the clause only went to the amount of damages, and that the present case is, therefore, distinguishable from the wording of the clause in *Taylor v. Hamstead Colliery*

Co. (1). Up to a point, I agree with that contention, if it be required, but, if the contract bound the dependants, the distinction does not help the widow in the present case, for she would, on that assumption, be tied by the money limits of the company's "contribution" in case of death: see p. 4, para. II (i.), and pp. 6 and 7, cl. (A), with its maximum of 600*l.*, taken from the Workmen's Compensation Act itself. A further point was made by Mr. Beney on the language of cl. (B), that the words "persons claiming under me" do not include dependants who stand on their own statutory right conferred by the Fatal Accidents Acts, whether they sue in their own name or in the name of the personal representatives of the deceased. On the whole, though frankly with doubt, I think that the words in question are ambiguous, and that, therefore, they should be construed *contra proferentem*, that is to say, against the company, as not including dependants claiming under the Fatal Accidents Acts.

This conclusion, however, only disposes of the defence based on the interpretation of the special contract contained in the signed and countersigned application form, and, if my interpretation is wrong, the validity of the terms of that contract call for serious consideration. It went far beyond the mere election by the deceased to become a member of the fund and thereby to join in the scheme as contemplated by s. 31. It contained a wholly separate contract in the added cl. (B)—a contract which, when made by the deceased as an infant in 1909, was not binding on him, but which, if it was a valid contract, he frequently ratified afterwards as an adult both by his contributions of a penny a week and by receiving small sums at the quinquennial renewals, and, apart from s. 31 of the Act of 1925, there is no legal impediment against an adult workman contracting out of his rights at common law or under the Employers' Liability Act if he understands what he is doing as there is in the Workmen's Compensation Act. But, in my view, the intention of s. 31 is to lift the Act's ban on contracting out only within rigorously defined limits and solely to translate statutory rights to workmen's compensation into contractual rights not less advantageous to the workman than those conferred by the Act. It is important to note that there is in s. 31 no reference to s. 29. In my opinion, s. 31 has nothing whatever to do with the workman's rights of action at law, still less with such rights of

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action at the instance of his dependants. It seems to me absurd to suppose that the Registrar of Friendly Societies was given by Parliament delegated power to pass his opinion on such complicated legal questions as would be involved for him in the duty of determining whether the scheme gave dependants a fair equivalent for their rights (preserved for them by the Workmen's Compensation Acts) under the Fatal Accidents Acts to enforce claims at common law for the "personal" negligence of the employer as for breach of an absolute statutory duty (as illustrated, for instance, by *Lochgelly Co. v. M'Mullan* (1)), or under the Employers' Liability Act, 1880. If that view of the restricted scope of s. 31 is well founded, the conclusion follows that the registrar would have no power to certify any scheme containing such a provision, and, therefore, that ambiguous words in the certified scheme should here, too, be construed so as to exclude such an interpretation. On that footing of construction, I am of opinion that the scheme in the present case contains no such provision.

But, if that be the law and that be the scheme, what follows as regards the separate contract which the workman was invited by the company to sign as a condition of joining in the scheme? If I may use a metaphor, cl. (B) was "a clog on the "equity," in the sense that it was improper for the company to incorporate it in their invitation to the deceased to join in the scheme, but I go further and say that, in my opinion, that clause was inconsistent with the terms of membership of the scheme which it was the statutory duty of the company under each of the Workmen's Compensation Acts to offer to the deceased. The certificate of the Registrar of Friendly Societies was intended by the Acts to be a certain assurance to the workmen, on which they could rely with a sense of security, that, by accepting membership, they were exchanging for their statutory rights under the contemporary Workmen's Compensation legislation contractual rights which might be more advantageous for them, but could not be less advantageous than those of the Act itself. I regard the terms of s. 31 and its predecessors as mandatory on the employer, and as carrying an implicit prohibition against any addition to the certified scheme which was, or might be, prejudicial to the workman or his dependants in the sense I have indicated. The result is that that portion of the contract of membership should be treated by this court as a nullity. It would be no answer to

this reasoning to say that the men's trades union passed cl. (B), even if that had been proved in evidence. The basic principle of the Workmen's Compensation Acts limits freedom of contract. The rights of action at common law under the Employers' Liability Act, 1880, for damages has been preserved with paternal care from the very first, beginning with s. 1 of the Act of 1897. The course adopted by the company in the obnoxious addition of cl. (B) to their invitation to their workmen is contrary to the spirit of the careful preservation in the statute of the workman's option, an option which, for reasons which I have given, could not be exercised before knowledge of the facts giving rise to the need of choice. That aspect confirms my conclusion that the clause is illegal on the grounds I have stated.

For the above reasons, if I am not bound by *Taylor v. Hamstead Colliery Co.* (1) to decide otherwise, I hold (though with a little doubt as to my freedom) that the appeal succeeds and that the judgment below must be set aside and judgment entered for the plaintiff for 885*l.*, with costs here and below, the latter on scale C.

DU PARCQ L.J. The defendants' case in this appeal may be summarized as follows: (1.) *Taylor v. Hamstead Colliery Co.* (1) is relied on as establishing the proposition that, when employer and workman have agreed that the provisions of a certified scheme shall be substituted for the provisions of the Workmen's Compensation Act, the employer is freed from any liability to the workman or his dependants at common law or under the Employers' Liability Act in respect of injuries by accident in the course of and arising out of the workman's employment. (2.) It is said that the terms of the agreement entered into between the workman and his employers in the present case were such as to preclude the workman while he lived from maintaining an action or recovering damages. It is contended that, as the workman purported to bind those "claiming under him," the plaintiff is no more able than the workman himself would have been to succeed in an action for damages. Further, it is said that she can have no rights under the Fatal Accidents Act, because it is essential to a claim under that Act that the deceased, if death had not ensued, should have been entitled to maintain an action and to recover damages.

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I will deal with these two contentions in their order. As to the first, if I had been considering this case without regard to any authority, I should have thought it hopeless to argue that when a workman agreed to accept a scheme in substitution for the provisions of the Act he thereby necessarily abandoned all, or any of, his rights against his employer at common law or under the Employers' Liability Act. The intention and the words of the Workmen's Compensation Act are plain. (For convenience sake I will refer to the Act of 1925, which reproduced the material provisions of the earlier Acts.) Sect. 29 provides that nothing in the Act shall affect any civil liability of the employer, and gives the workman a right, at his option, either to claim compensation under the Act, or to take proceedings independently of it. Sect. 31 enables the contracting parties to put the provisions of a certified scheme in the place of the provisions of the Act. If they do so, and if the scheme does not itself contain any provision which restricts the right of the workman to bring an action against his employer, I fail to see how his adherence to the scheme can affect that right. It is not suggested that s. 29, which contains the words "Nothing in this Act shall affect any civil liability of the employer," is one of the "provisions of the Act" for which the "provisions of the scheme" are to be substituted. On the contrary, the words now contained in that section are relied on by the defendants, as they were by the successful appellants in *Taylor v. Hamstead Colliery Co.* (1). The only words in s. 31 which give any support to the defendants' contention are those which occur at the end of its first sub-section, but, with all respect to Mr. Lynskey's able argument, I find it almost frivolous to suggest that the words "shall be liable . . . only in accordance with the scheme" are apt to free an employer from all liability for torts which result in injuries arising out of and in the course of a workman's employment. It seems to me to be too plain for argument that the scheme is to replace the Act within the limits within which the Act operates. The Act does not affect the civil liability of the employer. Normally, the scheme will not affect it either, and, indeed, I would venture to say that, if the Registrar of Friendly Societies acts as Parliament expected him to act, a scheme which he has certified will never affect civil liability any more than the Workmen's Compensation Acts themselves affect it. In the present case, the scheme

(1) [1904] 1 K. B. 838.

which the registrar certified does not contain anything which purports to affect the civil liability of the employers, and, in my opinion, the workman's agreement to accept it would not, of itself, in any way affect those of his rights which are correlative to that civil liability.

I should, therefore, reject the first of the defendants' submissions without any hesitation at all were it not for the decision in *Taylor v. Hamstead Colliery Co.* (1). The learned judge has felt himself compelled by the authority of that case to decide in favour of the employers. Unfortunately, the report of the case in the Law Reports, to which alone the learned judge's attention was directed, is so inadequate as to be misleading, since a material provision in the scheme is not set out in it. The facts are to be found, however, in the report in 20 T. L. R., where it is made plain that the scheme itself provided as follows: "The contributions made by the 'employers to this society' (namely a society formed under the powers given by s. 3 of the Workmen's Compensation Act, 1897) 'are to be in lieu of and to exempt them from any 'further claims which otherwise the members of this society 'may be entitled to prosecute as the result of accidents 'occurring during their employment.'" If it be assumed that this term could lawfully be included in the contract by which the workman agreed to adopt the provisions of the certified scheme, it seems reasonably clear that the workman had wholly abandoned his right to bring an action under the Employers' Liability Act, so that a claim on behalf of his dependants necessarily failed. It was on this short and simple ground that the county court judge had decided against the personal representatives in *Taylor v. Hamstead Colliery Co.* (2): see the statement of the facts found by him at pp. 838 and 839 of the Law Reports.

I confess that, even when the facts are fully grasped, some of the language used in the judgments in the Court of Appeal, as they are reported, seems to me to be difficult to follow, and it is no matter for surprise that the learned county court judge has supposed that the decision of this court in that case supports the wide proposition contended for by the defendant employers. I am by no means convinced, however, that, if the scheme which was being considered in *Taylor v. Hamstead Colliery Co.* (2) had not contained a provision exempting the employers from liability, the decision of the Court of Appeal

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would have been the same. For this reason, and because the mind of the court was not directed to a case like the present, where no such provision is to be found in the certified scheme, I do not feel bound by the authority of *Taylor v. Hamstead Colliery Co.* (1) to accept a proposition which I am satisfied is unsound, and I hold that Mr. Lynskey's first point fails.

I must now deal with the second submission which was rejected by the learned judge and is the subject of the defendants' cross-appeal. It is not, I think, accurate to say that the workman's widow claims "under him." Under the Fatal Accidents Acts she has, as was said in *Nunan v. Southern Ry.* (2), "a new cause of action": see, especially, the judgment of Scrutton L.J. She claims in a different right, and her claim is for a different remedy. It is true, however, that, unless the deceased workman had at the time of his death a right to maintain an action and to recover damages for the act, neglect or default now complained of, the widow's claim must fail. The question is whether, by signing the document dated July 19, 1909, the workman gave up that right. The answer to this question must depend on the true construction of cl. (B) of that document. The problem is not an easy one. For the employers it is said that in effect the workman promised to make no claim for damages under the Employers' Liability Act or at common law. It was for the committee under the scheme to say what sum, if any, was to be allotted to the workman as compensation under the scheme. The committee might think that he was entitled to nothing, and he cannot, therefore, be said to have had a right to anything. Even if he had a right to recover anything, what he would recover would be, not damages, but compensation under the scheme. The argument, as it was presented, seems to me to overlook the fact that the clause assumes that the workman may have a good claim at common law or under the Employers' Liability Act, since it speaks of "satisfaction of" that claim. Such a claim can, I think, only be satisfied by payment of damages. The Employers' Liability Act itself speaks of "compensation," but it is certainly correct to describe sums awarded under it as damages. At the same time, it must be admitted that, if the clause means that, in the event of his making a common law claim, the workman is to get no more than the committee may choose to give him he cannot be said to have "a right" to recover damages.

(1) [1904] 1 K. B. 838.

(2) [1924] 1 K. B. 223, 227, 228.

The difficulty of construing the clause is due, I think, to the fact that the draftsman appears to have forgotten that the workman cannot prosecute in respect of the same injury a claim both under the scheme and independently of the scheme. That the workman cannot do this is, I think, clear. Sect. 29 of the Workmen's Compensation Act, 1925, precludes the workman from claiming both under the Act and independently of the Act, and a claim under a scheme sanctioned by the Act is a claim under the Act. This was laid down in *Taylor v. Hamstead Colliery Co.* (1), and, apart from authority, seems to be clearly right. It seems illogical and inconsistent, therefore, to talk of a claim made independently of the scheme being satisfied by the contribution made by the railway company and the payment of compensation under the scheme. If the workman claims independently of the Act, his claim will not come within the jurisdiction of the committee established under the scheme, and the scheme provides no machinery for the assessment of compensation by that committee except when a claim is made under the scheme.

On the whole, and not without doubt, I have come to the conclusion that the workman, notwithstanding the terms of cl. (B), retained his right both to maintain an action and to recover damages. I can best explain my reasons by considering how the matter would have stood if the workman, during his lifetime, had alleged, and the employers had denied, that he had suffered injuries, in the course of and arising out of his employment, through the negligence of a fellow servant. Let it be supposed that, instead of making an application under the scheme, he had brought an action under the Employers' Liability Act. It was suggested that the employers could have had his action dismissed on the ground that he was disentitled by his agreement from recovering damages, and, therefore, had no cause of action, but to this the workman might have answered: "The very agreement 'on which you rely supposes that I may have a claim, and a claim which is to be satisfied, and it can only be satisfied by a payment which, call it what you will, must, from the nature of the case, be a payment of damages. True it is that, if the committee choose to allot compensation to me 'under the scheme' I must accept as damages what they allot to me. Be it so. If, however, nothing is allotted to me under the scheme, I shall retain my right to have damages

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"awarded to me by a court of law." That answer would, I think, have been justified by the language of the clause. It must be confessed that it leaves unanswered the question whether, on a claim being made under the Employers' Liability Act, the committee would have any authority to "allot" compensation under the scheme, and, if so, whence they derive such authority. It may be that the agreement contained in cl. (B), though it is clearly outside the scheme, confers authority on the committee as assessors to fix the amount of damages on the same basis as if they were assessing compensation under the scheme. Or it may be that the committee would not have been competent, in the circumstances supposed, to deal with the matter at all, and that the workman, there being no possibility of an allotment of compensation to him under the scheme, would have been remitted to his legal remedy in the courts, where the judge's jurisdiction to award damages would not have been restricted by cl. (B). It is enough to say that I am not satisfied that in the case supposed the workman's action could have been dismissed, and, if he had proved the facts necessary to establish the employers' liability, he would, I think, in one way or another, have recovered damages against them, though those damages might have been limited in amount. It follows that the widow is in a position to prove all that the Fatal Accidents Act requires.

For these reasons, I am of opinion that the respondents' second submission also fails. I have assumed throughout this judgment that when a workman is invited to adhere to a certified scheme it is lawful to require him, as a condition of the employers' acceptance of the scheme, to "contract out" of his rights at common law and under the Employers' Liability Act. I have had the advantage of reading and considering the judgment of Scott L.J., who has come to the conclusion that such a condition may not lawfully be introduced into an agreement by which the provisions of a scheme are substituted for those of the Workmen's Compensation Acts. I must not be taken to dissent from that conclusion. I am, indeed, disposed to agree, having regard to s. 29 of the Workmen's Compensation Act, 1925, that it cannot have been the intention of the legislature to allow such a term to be grafted on a contract made under s. 31, sub-s. 1, even though it must be conceded that, in an independent transaction, a workman may lawfully barter away his rights at common law

and under the Employers' Liability Act for good, though possibly quite inadequate, consideration. I prefer, however, to found my judgment on the narrower grounds which I have stated, and for the reasons which I have given I agree that the appeal should be allowed.

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Appeal allowed : cross appeal dismissed.

Solicitors for plaintiff : *Kenneth Brown, Baker, Baker.*

Solicitor for defendants : *W. H. Hanscombe.*

A. W. G.

PROCTOR v. JOHNSON AND PHILLIPS, LIMITED.

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Apr. 12, 13.

Master and servant — Accident to servant — Dangerous industry — Electricity—Testing work—Precautions to prevent danger—Highest reasonable standard of safety—Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy in Premises under the Factory and Workshops Acts, 1901 and 1907 (St. R. & O., 1908, No. 1312), exemption 4.

Exemption 4 of the Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy in Premises under the Factory and Workshops Acts, 1901 and 1907, provides : " Nothing in these regulations shall apply to any process or " apparatus used exclusively for . . . testing or research " purposes ; provided such process be so worked and such " apparatus so constructed and protected and such special " precautions taken as may be necessary to prevent danger." This proviso does not impose on an employer the obligation to take such special precautions as to remove all possibility of danger, for a construction must be put on the proviso which will not prevent testing and research work with highly dangerous apparatus being carried out. The precautions taken need only comply with the highest standard of safety that can reasonably be provided.

APPEAL from Hilbery J.

The plaintiff was the mother of William James Proctor, who was employed by the defendants as a cable tester at their electrical works, and was killed on January 24, 1941, while working in the supertension test department. This was a dangerous area into which high electric pressure passed, and in it there were two transformers, Nos. 4 and 6, and other apparatus, current being brought to the terminal of No. 4 transformer

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from a transformer in another area by means of a high tension cable. On the night of January 23-24 the area had been used for testing cables, and, although at the time of the accident, the current was switched off No. 6 transformer, the test was still going on and the current to No. 4 transformer was not cut off. The plaintiff brought this action for damages under the Fatal Accidents Acts, 1846-1908, claiming that the defendants had committed a breach of exemption 4 of the regulations. The defendants denied that they had committed a breach of statutory duty, and also set up the defence of contributory negligence. Hilbery J. said that, having regard to the view which he took on the issue of contributory negligence, it was not necessary for him to decide whether the duty imposed on the defendants by the proviso to exemption 4 "to prevent danger" was absolute. Assuming that it was, he was satisfied that the cause of the accident was the contributory negligence of the workman, and he, therefore, dismissed the action. The plaintiff appealed. The Court of Appeal held unanimously that the accident was due to the contributory negligence of the workman, and (by Lord Greene M.R. and Goddard L.J., MacKinnon L.J. declining to express an opinion on the point) that the defendants had taken such special precautions as were necessary to prevent danger within the proviso to exemption 4, and these parts of the case do not call for report, but they also dealt with the construction of exemption 4.

Sir Walter Monckton K.C. and Montague Berryman for the plaintiff. Exemption 4 of the regulations which exempts any process or apparatus used exclusively for testing and research purposes from the provisions of other regulations is subject to the proviso that "such special precautions" must be taken "as may be necessary to prevent danger." That proviso is absolute, and the mere fact that this accident happened proves that it was not complied with. It may be said that it was impossible to work the apparatus and carry out the test in such a way that there was no danger, but, if the effect is to prevent the test being carried out, that does not alter the position: per Salter J. in *Davies v. Thomas & Co.* (1), discussed in the House of Lords in *Lewis v. Denye* (2). [LORD GREENE M.R. Exemption 4 contemplates the continuance of testing and research.] It does not

(1) [1919] 2 K. B. 39.

(2) [1940] A. C. 921.

authorize any sort of test. It only excepts testing from the other regulations, subject to the workman being protected from danger. Other regulations specify particular things to be done. They are made inapplicable to testing operations, but, in place of them, the burden of protecting the workman is placed on the employer. Exemption 4 really imposes a higher obligation because the work is so dangerous.

Lynskey K.C. and *Alun Pugh*, for the defendants, were not called on to argue.

LORD GREENE M.R. The question for our determination is whether or not the steps taken by the defendants were an adequate compliance with the statutory regulations. The apparatus in question was used exclusively for testing or research purposes, and, accordingly, exemption 4 to the regulations applies. It has been argued that, on its true construction, the proviso to the exemption introduces a positive rule, and that anyone who relies on the exemption must show that he has complied with the requirements set out in the proviso. It seems to me that that is the common sense construction, and I shall assume that it is correct.

What is the obligation which the proviso imposes on the person in charge of the process or apparatus? If the proviso is read literally it imposes an obligation to take such precautions as may be necessary to prevent danger, but in operations of the kind contemplated the complete elimination of danger must on the face of things be an impossibility. Danger may arise from the failure of some electrical operation or through some error or carelessness on the part of some member of the staff. It would seem that if the regulation is read in such a way as to impose an absolute obligation to eliminate any possibility of danger, it would make impossible any use of the process or apparatus in question. It is contended that the provisions of the proviso must be complied with, and, if the apparatus cannot be completely guarded from danger, its use must be prohibited. Reference was made to the judgment of Salter J. in *Davies v. Thomas & Co.* (1) (discussed in the House of Lords in *Lewis v. Denye* (2)), where he said: "if a machine cannot be securely fenced "while remaining commercially practicable or mechanically "useful the statute in effect prohibits its use." So it is said here that, if testing or research cannot be carried out with the

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entire elimination of danger, it is prohibited. The question whether or not the opinion of Salter J. is correct does not arise in the present case. He was dealing with regulations relating to machines in general, and he took the view that, if a particular machine could not be securely fenced, it could not be used at all. The present case does not deal with machines, but with the operations of testing and research. Those operations may involve a multitude of apparatus, some of it of a novel kind for which no regulation could provide. The exemption contemplates that testing and research is going to continue, and to construe it so as to make testing and research impossible, would be to go a great deal further than Salter J. went.

In my opinion a sensible construction must be put on this exemption which will not prevent testing and research with this highly dangerous apparatus from being carried out. The precautions required to prevent danger can only be those which comply with the highest standard of safety which can reasonably be provided. It might, of course, be that a particular piece of apparatus for research was in itself so highly dangerous that no safety precautions could introduce a reasonable measure of safety. That would give rise to a different question, and it may be that in such a case the proviso to the exemption could not be complied with. I express no opinion on this. The case with which we have to deal is that of an ordinary operation such as is carried out in many establishments and with regard to which precautions can be taken to insure the necessary standard of safety.

MACKINNON L.J. [after holding that the workman's death was caused by his contributory negligence:] That view is, of course, on the assumption that the danger in the area was created by the failure of the defendants to comply with the requirements of exemption 4, namely, that such special precautions should be taken as might be necessary to prevent danger, but as to that question I agree with what has been said by the Master of the Rolls and do not wish to add anything. I agree, therefore, that this appeal fails.

GODDARD L.J. I agree with the Master of the Rolls, especially in that part of his judgment which has said that there has been no breach here by the defendants of exemption 4. The proviso to the exemption obliged them to take such

special precautions as might be necessary to prevent danger. It is clear that they did take special precautions such as they deemed, and such as were generally deemed in the trade, to be necessary to prevent danger. I cannot think that it is a fair reading of this exemption to say that the mere fact that an accident happened, the cause of which no one can explain, shows that they had neglected their obligation to take special precautions. There are many situations in life when people take the special precautions which are necessary to avoid danger. A careful paterfamilias takes special precautions in his house necessary to prevent danger to his children. The provision of adequate fire-guards, of bars at the nursery window, of a gate at the top of the stairs to the nursery, are special precautions necessary to prevent such danger, but no precaution has ever yet been taken which will entirely eliminate risk. I cannot think that this proviso can be construed as meaning that, if an accident takes place, that of itself is proof that the special precautions necessary to prevent danger have not been taken. I agree that this appeal should be dismissed.

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*Appeal dismissed.*Solicitors: *W. H. Thompson ; Carpenters.*

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Applied. HOLT v. RHODES & SON,
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SPEED v. THOMAS SWIFT AND COMPANY, LIMITED.

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Negligence—Master and servant—System of working—Loading of ship—Apr. 2, 6, 21.
Use of "married gear"—Common employment.

An employer's duty to provide a safe system of working must be considered in relation to the circumstances of each particular job, and, if he delegates that duty, he remains responsible for any inadequacy of the system, and cannot excuse himself by showing that he had good grounds for relying on the competence of the person to whom he delegated it.

A ship was being loaded from a barge alongside by the use of "married gear" which involved joining the falls of the port and starboard winches and using the winches together. In the course of the operation an empty hook, while being brought back to the ship's side, caught in a section of the rail and caused it and a piece of timber lying against it to fall into the barge and injure the plaintiff. The evidence showed that the normal system of working was to remove the material section of rail when working with single gear and to leave it when working with married gear,

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as the risk of a hook catching in it was then far less. There were, however, special circumstances with regard to this particular ship which increased the danger. These were that at one end of the section of rail in question the adjoining section had been removed owing to a collision, that timber was lying against the rail, and that the port winch was out of order. In an action by the plaintiff against his employers for damages :—

Held, that, in view of the special circumstances the section of rail ought to have been removed or so protected that no hook could catch in it, and, therefore, that the employers had failed to provide a safe and proper system of working adapted to the special circumstances.

Wilsons and Clyde Coal Co. v. English [1938] A. C. 57 applied.

APPEAL from the assistant presiding judge of the Court of Passage, Liverpool.

The plaintiff was a dock labourer employed by the defendants, who were stevedorers, and he was injured by accident on November 10, 1941, while employed in loading the steamship *City of Cairo* with drums of caustic soda from a barge alongside. The loading was carried out by the use of "married gear," a system by which both the port and starboard winches were used together, the falls of the two winches being attached. On November 10, 1941, the slings used in hoisting the drums were being brought back empty from the hatch to the side of the ship when the fall from the port winch was released suddenly, and, although the driver of the starboard winch put on steam, a hook caught in a section of the ship's rail, with the result that both the section of the rail and a piece of timber lying against the rail fell into the barge, and the plaintiff, who was at work in the barge, was injured. On January 17, 1942, the plaintiff began proceedings against the defendants for damages for negligence, alleging (inter alia) that the defendants had failed to provide a safe or proper system for the loading of the ship in that they failed to remove the section of rail during the loading and left a quantity of timber or dunnage lying on the deck near the rail. The defendants denied that they had been negligent and relied on the defence of common employment. Their case was that the general system of leaving the ship's rail when working with "married gear" was a proper one, and that any failure of the foreman stevedore to adapt the general system to the particular ship was his personal negligence and the defence of common employment applied. According to the evidence and the findings of the assistant presiding judge, there were certain special features of additional danger about

the ship. As a result of damage by collision the ship's rail forward of the section referred to had been removed so that one end of the section was unattached to any adjoining section and was only held by a rope. Further, the timber or dunnage lying on the deck was likely to be dislodged and to fall into the barge if the section of rail was caught by a hook. In addition, the port winch was not in perfect order, and was, in consequence, difficult to control. The assistant presiding judge held that the plaintiff's injury was due to the defendants' failure to provide and maintain a proper system of working as distinct from a casual departure from a proper system owing to the negligence of a fellow workman of the plaintiff. The general system of leaving the rail in position when married gear was in use was not sufficient. The system should have provided for the removal of the section of rail, if possible. The special circumstances in the ship made it necessary to do so or else to protect the rail with boards. He, therefore, gave judgment in favour of the plaintiff for 127*l.* damages. The defendants appealed.

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Blackledge for the defendants. The defendants had adopted a reasonable and proper system of working under which the material section of the ship's rail was removed when a single gear was being used and was not removed when married gear was in use. The evidence was that there was a considerable likelihood of the hook catching in the rail in the former case but not so in the latter case. It is not possible to have a system of work adopted to the conditions of each particular ship which is loaded. The system is a general and a proper one, and is in use throughout Liverpool docks, and it is for the foreman stevedore to make such variation as special conditions require. Here the foreman stevedore decided that the rail should not be removed. The defendants are not liable for any failure of the foreman to adapt the system to the particular ship: *Wilsons and Clyde Coal Co. v. English* (1). The Lord Justice Clerk in the hearing of the same case in the court below (*English v. Wilsons and Clyde Coal Co.* (2)) discusses the question of what is system and what falls short of system and says: "The distinction is between the general and particular, between the practice and method adopted in carrying on the master's business of which the master is presumed to be aware and the insufficiency of which he can guard against, and isolated

(1) [1938] A. C. 57, 84.

(2) 1936 S. C. 883, 904.

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"or day to day acts of the servant of which the master is not presumed to be aware and which he cannot guard against." This is exactly the distinction it is sought to make in this case between the general system of the defendants and the acts of the foreman in reconciling it to the conditions on a particular ship: see also *Bain v. Fife Coal Co.* (1), *Hedley v. Pinkney & Sons Steamship Co.* (2), *M'Millan v. Barclay, Curle & Co.* (3), *Grantham v. New Zealand Shipping Co.* (4) and *Gutteridge v. Frederick Leyland & Co.* (5). Those authorities sufficiently show the principles to be applied to the facts of each case in considering whether the employers have provided a proper system. Further, the special difficulties should be kept in mind. The foreman did not have a removable rail to deal with, but one which could only be removed by getting the ship's staff to remove it.

Wooll for the plaintiff. The plaintiff's accident happened owing to a combination of four facts: (1.) the failure to remove the material section of the ship's rail; (2.) the absence of a neighbouring section to which the material section would normally be attached; (3.) the dunnage resting against the rail; and (4.) the defective winch. None of these would have mattered if the material section of rail had been removed, and it was the failure to remove it that caused the accident. It is immaterial that the customary system of work was used. The question is whether the system was as safe as care and skill could make it. To escape liability the defendants have to show either that they had provided the safest possible system or that the accident was due to a casual piece of negligence on the part of one of the employees. They have failed to establish either of these. The court will not disturb the findings of fact by the assistant presiding judge that when married gear was in use there was some risk of the hook catching in the ship's rail; that, if it was possible to remove the material section of rail, it should be done; and that the material section was removable and should have been removed. There were also the further findings as to the particular conditions which caused increased danger. The real question is whether the duty of stevedores is limited, to providing a general system of working or whether their duty is to evolve a system for the particular job in hand. The fair inference from the decisions in *Grantham v. New Zealand*

(1) 1935 S. C. 681.

(2) [1894] A. C. 222.

(3) 1912 S. C. 263.

(4) [1940] 4 All E. R. 258.

(5) (1941) 69 Ll. L. Rep. 63.

Shipping Co. (1) and Gutteridge v. Frederick Leyland & Co. (2) is that the employers have to provide a system adapted to the particular job, and the real fault here was in not adopting a system suited to the conditions in the particular ship. It is impossible to have a cast-iron system for working on all ships. Any variation required by the ship is a variation in system and not a casual alteration. The foreman is acting as the employers' agent to modify the normal system into another system, and the employers are vicariously liable for their agent's fault: *Wilsons and Clyde Coal Co. v. English* (3).

Blackledge, in reply, referred to *Wilson v. Merry* (4) and *Smethurst v. Beaumonts (Manchester), Ltd.* (5).

Cur. adv. vult.

Apr. 21. The following judgments were read.

LORD GREENE M.R. The learned assistant judge in his careful judgment found that in the operation on which the plaintiff was engaged there were three elements of danger, namely, (1.) the defective working of the port winch, (2.) the condition of the starboard rail, and (3.) the presence of a quantity of dunnage on the deck beside the rail. There was ample evidence on which he could find as he did with regard to these dangers, and I find no reason for differing from his conclusions on them. As I read his judgment, it was the existence of these dangers which made it imperative to remove or protect the rail, and the failure to do so made the system of working adopted for this particular job unsafe. I do not think that he meant to say that in all cases where married gear is used the rail should be removed or protected. Had he said so, I should not have agreed with him, for the evidence does not appear to me to warrant such a conclusion. In working married gear, the danger of the hook catching on the rail is minimized by the fact that the position of the outboard derrick is such as to lead the hook away from the top of the rail. It is true that there is always some danger that the hook may catch, but, provided that the winches are working satisfactorily and the men in charge of them possess the customary skill, the risk is slight and I do not think that failure to remove or protect the rail can be said in all cases to make the system of working unsafe.

(1) [1940] 4 All E. R. 258.

(4) (1868) L. R. 1 H. L. (Sc.) 326.

(2) (1941) 69 Ll. L. Rep. 63.

(5) (1940) Unrep.

(3) [1938] A. C. 57, 64, 67.

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The real question is whether or not, in the particular circumstances of this case, failure to remove or protect the rail constituted the system of working an unsafe one. On the one hand, it was said that the system of working married gear is one under which the rail is not removed or protected; that if, in any particular case, special reasons exist for removing or protecting it, the decision must rest with the foreman in charge of the job; and that, if he fails to remove it or protect it, the fault is his alone, due to his casual negligence in working the system. On the other hand, it was said that the duty of providing a safe system must be considered, not generally, but in relation to the particular circumstances of each job and that in the present case the circumstances were such as to call for the removal or protection of the rail.

In my opinion the latter view is the correct one. What exactly is meant by "a safe system of working" has never, so far as I know, been precisely defined. The provision of such a system falls within the master's province of duty. If he delegates it, he remains responsible for any inadequacy in the system just as much as if he had personally provided it, and he cannot excuse himself by saying that he had good grounds for relying on the competence of the person to whom he delegated the duty: *Wilsons and Clyde Coal Co. v. English* (1). The nearest approach to the definition of "system" of which I am aware is that contained in the judgment of the Lord Justice Clerk in the Court of Session in the case just mentioned (2): "What is system and what falls short of system may be difficult to define, and it may be often far from easy to say on which side of the line a particular case falls, but, broadly stated, the distinction is between the general and the particular, between the practice and method adopted in carrying on the master's business of which the master is presumed to be aware and the insufficiency of which he can guard against, and isolated or day to day acts of the servant of which the master is not presumed to be aware and which he cannot guard against; in short, it is the distinction between what is permanent or continuous on the one hand and what is merely casual and emerges in the day's work on the other hand. This distinction as bearing on the master's liability, however difficult it may be to define, has been uniformly recognized in the practice of the Scottish courts." I do not interpret this as meaning that the duty

(1) [1938] A. C. 57.

(2) 1936 S. C. 883, 904.

of an employer is performed by laying down a general system of working for a type or class of job, leaving it to the discretion of the person in charge of a particular job to decide what modifications should be made in the system to meet special circumstances or eventualities which may exist or arise. If this is what the passage means, it does not appear to me to be in accord with the reasoning of the House of Lords. In cases where the work to be performed is regular and uniform, as in the ordinary factory or mine, provision of a safe system for the type or class of work and provision of a safe system for the individual job will in general be the same although a particular occurrence or emergency may call for special precautions, but in many kinds of work there is no such regularity or uniformity, and what is a safe system can only be determined in the light of the actual situation on the spot at the relevant time. A system of working may consist of a number of elements and what exactly it must include will, it seems to me, depend entirely on the facts of the particular case. For example, one element may be the sequence in which a particular job ought to be carried out, e.g., in a combined job of demolition and excavation it may be dangerous to begin to excavate before a neighbouring structure is demolished. The decision as to which task is to be performed first appears to me to lie within the master's province and to be a matter of system. It is part of the lay-out of the job which it is the master's duty to decide, and, in doing so, he must pay proper regard to the conditions affecting the safety of his men. The lay-out of the job is logically prior in time to the commencement of the work although, of course, it may have to be modified as the work proceeds, e.g., if in the course of the work a neighbouring bank threatens to collapse on the workmen, the taking of proper steps to shore it up is, it appears to me, a matter of system. It is logically prior in time to the continuance of the work and is concerned not with the work itself, but with the safety of the conditions in which it is performed. I do not venture to suggest a definition of what is meant by system, but it includes, in my opinion, or may include according to circumstances, such matters as the physical lay-out of the job—the setting of the stage, so to speak—the sequence in which the work is to be carried out, the provision in proper cases of warnings and notices, and the issue of special instructions. A system may be adequate for the whole course of the job or it may have to be modified or improved to meet

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circumstances which arise. Such modifications or improvements appear to me equally to fall under the head of system.

The examples which I have given are not intended in any way to be an exhaustive list. I give them merely to bring out the point that the safety of a system must be considered in relation to the particular circumstances of each particular job. If the master is unable to give such close attention to every job which he undertakes as will enable him to provide a safe system for all of them and is thus compelled to leave its provision to others, he cannot escape responsibility. The way to test the correctness of my view is to consider the case where the master is present himself. In such a case, if he lays out the job in a way which is not reasonably safe and sets his men to work in dangerous conditions which could be eliminated by the exercise of due skill and care, it appears to me impossible for him to say that he has not failed in a duty which lies on him and on no one else. Applying these principles to the present case, I am of opinion that, in laying out the job, it was the master's duty to take what in the circumstances would have been the reasonable step of removing or protecting the rail: that by leaving to the foreman the decision (if, indeed, it was left) whether or not the rail should be removed, the master was in fact delegating the duty of providing a safe system of working; and that, accordingly, this appeal fails and must be dismissed with costs.

MACKINNON L.J. (read by Goddard L.J.). It is not difficult to enunciate in general terms the principles laid down in various cases, and, particularly, by the House of Lords in *Wilsons and Clyde Coal Co. v. English* (1). They seem to be these:— (1.) It is the duty of an employer towards his servants to provide a safe system of working in the operation the servants are to carry out. (2.) The employer may, and in many cases must, delegate the provision of such a system to an agent, but in such a case the employer is responsible for any failure of such agent to provide such a system. (3.) If injury to a workman is caused by the failure of the employer, either personally or vicariously, to provide such a system of working, the employer is liable to pay damages to the workman for such injury. (4.) If, however, the employer has fulfilled, either personally or vicariously, the duty of providing such a system and a workman is injured by the failure of a fellow workman (even though he may be in a superior and commanding position

towards the injured man) to carry out the system properly, the doctrine of common employment absolves the employer from liability to the injured workman.

It is, I say, not difficult to enunciate these general principles. The difficulty is to apply them to the facts of a particular case. In *Wilsons and Clyde Coal Co. v. English* (1) the House of Lords was not involved in that difficulty. The facts had been found by the jury in their answers to eight specific questions, of which the first five were conclusive. The questions in dispute in the appeal were mainly directed to the establishment of the second of the propositions which I have stated, and its affirmation involved the overruling of *Fanton v. Denville* (2). But in a case like the present, where the judge or this court has to find the facts as well as apply those principles of law, the task is one of extreme difficulty. With good reason Lord Wright said (3): "It may be difficult in some cases to distinguish on the facts between the employer's failure to "provide and maintain and the fellow-servant's negligence in "the respects indicated." This is obvious, for at once these questions arise: (1.) What is meant by "the provision of a "system of working"? (2.) What differentiates the function of the agent by whom the employer provides the system and the fellow workman who is charged with carrying out a system that has been provided? and (3.) What is the dividing line between the provision of a system of working and acts which are involved in carrying out a provided system?

The only guidance I can discover as to what is meant by "providing a system" is in some of the cases. In *Wilsons and Clyde Coal Co. v. English* (1), where the jury found that a reasonably safe system had not been provided, that was apparently because such a system would require that haulage work should be stopped from 1.30 to 2 P.M. when the day shift men were leaving the pit, and proceeding along the underground ways for that purpose. By contrast in *Wilson v. Merry* (4) the system involved was that of the ventilation of the mine. The employers had provided a proper system of ventilation. The pursuer was injured at a time when the system of ventilation was defective. It was defective because one Neish, who was the underground manager of the mine, had interfered with its proper working by having a scaffolding erected in order to open up from it a new seam. It was held that the

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(1) [1938] A. C. 57.

(3) [1938] A. C. 85.

(2) [1932] 2 K. B. 309.

(4) L. R. 1 H. L. (Sc.) 326.

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case fell within the fourth of my propositions, that the pursuer was in common employment with Neish, and the mine owners were not liable. In other words, the employers had provided a proper system, but the injury was caused by the failure of Neish to work that system properly. And, in other words again, Neish, though he was so high up in the hierarchy of servants as to be underground manager of the mine, was not to be treated as the agent of the employers delegated to provide the system of working, but as a fellow employee of the pursuer who had failed to carry out properly the system provided by the employers. Lord Wright in *Wilsons and Clyde Coal Co. v. English* (1) says that the immunity of the employer who has fulfilled his duty is not "broken by a mere "misuse or failure to use proper plant and appliances due to "the negligence of a fellow-servant . . . or a casual departure from the system of working, if these matters can be "regarded as the casual negligence of the managers, foreman, "or other employees." Having regard to the status of Neish in *Wilson v. Merry* (2) and the nature of his interference with the ventilation system, I find it difficult to think that his action could be reasonably called "a casual departure from the system "of working" and "casual negligence" on his part, but these considerations, I dare to think, emphasize how difficult it is to find proper answers to the three questions I have propounded above.

In the present case the plaintiff was injured during his work for the defendants. The learned assistant presiding judge came to the conclusion on the facts that his injury came within the third of the principles I propounded at the beginning of this judgment, and the defendants were, therefore, liable to compensate him. The defendants in this appeal contend that the proper conclusion on the facts is that they bring the case within my fourth proposition. The problem set for us is to decide between these two views.

The work that was being carried out by the defendants when the plaintiff met his injury was that of loading drums brought in a barge alongside the steamship *City of Cairo* into the hold of that vessel. The plaintiff was one of the men in the barge who had to attach the slings of a chain to the drums so that they could be hoisted up the side of the ship, over the deck to the region above the hatchway, and lowered into the hold through the hatch. The motive power for this operation

(1) [1938] A. C. 84. (2) L. R. 1 H. L. (Sc.) 326.

was provided by the ship's derricks. The derricks were worked by employees of the defendants who were fellow employees of the plaintiff. They and the plaintiff were under the orders of another employee, a foreman who was called the "hatch boss." The accident that resulted in the plaintiff's injury was that, when the slings were being brought back from the hold over the side to be let down again into the barge, a hook at the end of the chain caught in the ship's rail and pulled it from its sockets. This also disturbed some dunnage wood that was piled on the deck within the rail. Either the rail, or some of the wood, fell into the barge, hit the plaintiff and injured him.

As regards the system of working that ought to have been provided and carried out, the evidence for the plaintiff was solely that of the plaintiff and of a fellow workman named Dempsey. They both said that what was wrong was that the ship's rail ought to have been removed, and that they had previously protested to the "hatch boss" that it ought to be removed, but he had not had it done. They also said that in this work it was the invariable practice to remove the ship's rail, and the accident occurred because that practice was departed from by the supineness of the "hatch boss" on this occasion. That being the plaintiff's case, it seems to me that it only went to show that the point in which the system of working was improper or unsafe was the failure to have the ship's rail removed. The plaintiff said that on various occasions of similar work it had always been removed. Dempsey said: "If a rail is removable, it is the practice to remove it," and they both spoke to having protested to the "hatch boss" about his failure to have it removed. On this case, if the defendants had called no evidence, I should have thought the proper conclusion was that my fourth proposition was applicable, namely, that the defendants had provided a proper system under which a ship's rail was invariably removed and the accident happened through the failure of a fellow workman, the "hatch boss," to carry out that system. If, as the plaintiff and Dempsey said, it was the proper and invariable practice to remove the rail, I cannot think that my third proposition could be applied in the sense that the "hatch boss" was the delegated agent of the defendants to provide a proper system of loading this ship and he had, by failing to remove the rail, failed in the duty of providing such a system. It would seem to be, in Lord Wright's words, "a casual departure" by the "hatch boss" "from the system of working." The defendants,

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however, did call evidence, and that told the court a good deal more about this sort of business and how it was usually carried out. Their witnesses were the cargo superintendent, one of the winch drivers, the "hatch boss," a cargo checker at the hatch in question, and the foreman stevedore in charge of the *City of Cairo*. They only agreed with the plaintiff and Dempsey as to the necessity of removing the rail in case the operation was being performed by single gear, i.e., by one derrick only. On this occasion it was being done by married gear, i.e., by both derricks, and they all agreed that with married gear it was not the practice to remove the rail except perhaps in exceptional circumstances. They also testified that removing the rail, though necessary with single gear for the protection of the men in the barge, was by itself likely to create danger for other men working on deck who, by the absence of the rail, might fall overboard. With married gear they explained that the risk of the hook catching the rail (very constant with single gear) was so rare that it was the practice not to remove it. There was also evidence that this particular disaster was due to the faulty working of one of the winches. This developed a defect which in ordinary working had to be remedied by a simple operation performed by the ship's engineering staff who had to be applied to to carry it out.

On all these facts I find myself again acutely faced by the question I propounded earlier: "What is meant by the 'provision of a system of working?' " When that is asked as regards work in a particular factory, or in a mine (as in *Wilsons and Clyde Coal Co. v. English* (1) or in *Wilson v. Merry* (2)) the answer is comparatively easy. The work going on is always the same, and the "system" must be provided for that uniform operation. By contrast, suppose the work in hand is that of contractors erecting a factory. The "system" of doing that must be relative to the particular design, and the special circumstances of the building, which may well be completely without precedent. In this case the business in hand approximated more to the first type, in that all steamers are more or less alike. They all have hatches, derricks, and bulwark rails, but there is, no doubt, some difference between any one steamer and another, and theoretically the system might need to vary by reason of the particular type of steamer. In this case much reliance was placed on the fact that part of the rail in question had been previously removed or broken off,

(1) [1938] A. C. 57.

(2) L. R. 1 H. L. (Sc.) 326.

and it was said that this exceptional circumstance made it desirable to depart from the usual practice of not removing the rail when working with married gear. As I have said, the question for us is whether the judge was right in holding that the case came within No. 3 of my propositions at the beginning, or whether the defendants are right in saying that No. 4 of those propositions is properly to be applied. My mind has fluctuated constantly during the argument and in subsequent consideration. That uncertainty arises from my inability to give myself satisfactory answers to the three questions I have propounded. On the whole I come to the conclusion that there was evidence on which the judge could come to the conclusion to which he did. Further, having read the judgments prepared by my brethren, I have, after hesitation, come to the conclusion that he was right in coming to that conclusion. I, therefore, agree with them that the appeal fails.

I am tempted, I hope not improperly, to add some reflections which have been impressed on me by the anxious consideration I have devoted to this case. The existence of the common law doctrine of "common employment" was revealed by Lord Abinger in 1837 in *Priestley v. Fowler* (1). It is a doctrine which lawyers who are gentlemen have long disliked. Its unfairness has been mitigated by many modern cases, most of which are decisions of the House of Lords, but those decisions, necessarily laying down general propositions, involve such subtleties that the task of inferior tribunals in applying their principles to particular facts is one of immense difficulty. As a member of such a tribunal, I cannot help entertaining a regret that, by the exigencies of Parliamentary procedure, the House of Lords has had to pursue its mitigating and ameliorative task by judicial decision rather than by legislation. I suppose I shall not live to see it, but I hope my successors in such tribunals will some day be able to hail with relief a short Act of Parliament that abolishes the doctrine of common employment altogether.

GODDARD L.J. The doctrine of common employment still remains a part of the law of master and servant, though recent decisions of the House of Lords have done much to mitigate and circumscribe the rule which in modern times has always been regarded as based on somewhat artificial reasoning. Such

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justification as there was for it is out of keeping with present day conditions when employers are so often corporate bodies who can only act through individuals employed by them, but when it applies it is the duty of the courts to act on it. In English law there are two cases which are the important authorities for what we have now to consider. The first is *Smith v. Baker & Sons* (1), in which Lord Herschell stated the duty of the employer "so to carry on his operations as not to "subject those employed by him to unnecessary risk," and Lord Watson put it that a master who employs a servant in work of a dangerous character is bound to take all reasonable precautions for his safety. I think nowadays the words "of "a dangerous character " might be omitted from this passage, for from the next case that I will cite I think that it is plain that all reasonable precautions must be taken whatever the character of the work. That is *Wilsons and Clyde Coal Co. v. English* (2), where it was expressly laid down that the provision of a safe system of working is the obligation of the employer from which he cannot escape by appointing a competent agent to perform it. If the agent does not perform his duty the master remains liable. It was, however, recognized in that case that it may be difficult to distinguish between the employer's failure to provide or establish a proper system and the temporary departure from or casual negligence of managers or foremen in working the system. It is, indeed, not easy to determine in many cases what is meant by, or can properly be called, "system." In the case cited it was, I venture to think, comparatively easy, for the allegation was that it was contrary to the usual and recognized mining practice in Scotland for the haulage on the main roads in the pit to be continued at a time when the day shift men were being raised from the pit, and this the jury must be taken to have found by their verdict. Here we have to consider the case of the loading of a ship, a process in which, one would suppose, so many different circumstances may be present that it would be impossible to lay down hard and fast rules, and that much must necessarily be left to the judgment and common sense of the men on the job.

It is not suggested that the defendants issued any particular set of instructions to their foremen. It is also clear that there are two well-recognized systems of loading involving the use of single gear or married gear. Which of the two is the method

(1) [1891] A. C. 325, 362. (2) [1938] A. C. 57.

appropriate to a particular ship depends on a variety of circumstances, but I understand married gear is used when possible. The defendants must be taken to know and approve of this, and also of the fact, on which there was general agreement, that, if single gear is used, it is the right and proper thing for the protection of the lightermen that the ship's rail should be removed, or, if that is impossible, other precautions taken to obviate the danger of the hook on the gear catching on the rail. So much is this an integral part of the system of single gear loading that, I think, it must be conceded that it is part of the employer's duty to see that it is performed. In other words, it is a duty with regard to which he cannot escape liability if it is not performed. To use Lord Wright's words, it is to be performed *per se* or *per alios*. It is his personal duty, whether he performs or can perform it himself, or whether he does not perform or cannot perform it save by servants or agents. It is the details which make up the system, and if those which are necessary for its safe working are ignored or not provided, it appears to me impossible to say that a safe system has been provided. If, then, a gang were proceeding to load by the single gear method and the foreman failed to remove the rail, or, if that were impossible, to protect it, the employer would be liable if injury were caused thereby, but if, in the course of loading, he or another of the gang temporarily or carelessly removed the protection, I think this would be an act of casual negligence and the employer would be entitled to rely on the doctrine of common employment. My reason for this is that it appears from Lord Wright's statement of the law in *Wilsons and Clyde Coal Co. v. English* (1) that there is this difference between a statutory duty and a common law duty, that the former is absolute while the latter is fulfilled by the exercise of due care and skill though not by entrusting its fulfilment to employees (2). If the master were himself in charge of the operation and saw that the rail was properly protected, he would be fulfilling his duty of providing a proper system. If, when his back was turned or he had gone to another job, one of the men removed the protection and an accident happened, I cannot see that it could be said that the master had failed in his duty. On the other hand, as the duty of fencing machinery is imposed by statute, if a workman removes a fence provided by the master, the latter is liable to a workman injured

(1) [1938] A. C. 57.

(2) Ibid. 73.

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When one turns to the use of married gear I think the case presents great difficulty, partly because of the nature of the evidence, and also because I am not altogether clear as to the findings of the learned assistant judge. First, comes the question : "What is meant by defective system" ? The most helpful explanation I can find is that of the Lord Justice Clerk in *Bain v. Fife Coal Co.* (2). He says that in the Scottish courts it has been taken to include defects of a relatively permanent and continuous kind—of which the master must be presumed to have knowledge—as distinct from those of a transitory kind which may emerge in the day's working and are not part of the regular system or method of working. He instances the defective layout of a railway, or mining contrary to established practice. Precautions which are necessary for the safety of workmen seem to me to be necessary parts of any system, for, if they are neglected, the system is at once unsafe. The allegation as to defective system in the present case is to be found in the particulars of negligence, but I do not think I need read them. The evidence for the plaintiff left the matter in a condition far from satisfactory, and, indeed, I doubt if on his case there was any evidence of a defective system. [His Lordship reviewed the evidence.] Here we find a rail, the after part of which was not attached to the next section, a defective winch, and considerable dunnage on the deck which, if caught by an empty fall, might strike on the rail, which, though rusted into the sockets, could have been got out, as the accident showed. The learned assistant judge, after a careful review of the evidence, said that "During this particular operation "where there was a special danger of the section of the rail "being lifted by the hook, it ought to have been removed, or, "if that could not have been done owing to rust, the alternative method of placing boards alongside should have been "adopted, and that the system adopted was not a proper "system." Then, towards the end of his judgment, he says that it was the defendants' duty to provide a proper system of work during the process of loading this ship, and that by not removing or protecting the section of rail they failed to do so. He goes on : "I do not think that the general system "of leaving the section of rail in position when using married "gear was sufficient. I think it should have provided for

(1) [1933] 2 K. B. 669.

(2) 1935 S. C. 681, 692.

"the removal of the rail if possible, and that the special circumstances on board the *City of Cairo* made it necessary "so to do or to protect the rail." I am left in some doubt whether in this otherwise most helpful judgment he meant to hold that the removal of the rail is always as necessary when using married gear as it is admittedly when using single gear, or whether it was necessary because of circumstances special to this particular ship. If he meant the former, I do not think that the evidence justified the finding, but, in my opinion, his judgment can be upheld because, I think, the proper inference from the evidence is that in the use of married gear it is necessary to consider the circumstances of each particular ship in deciding whether it is safe to proceed with the rail in position. You cannot lay down a hard and fast rule, but the married system does require the removal as much as the single fall system in certain circumstances, and a careful employer must decide whether there is danger in leaving the rail in position according to the circumstances which are present. The decision to remove or leave the rail is thus part of the system. Had the employer been present himself on this occasion, there was evidence on which the judge could find that it would have been his duty, in order to make the married system on this operation safe, to order the removal or protection of the rail. If he did not order either of these precautions, he would not, as it seems to me and in the words of Lord Herschell which I have quoted, have been so carrying out his operations as not to expose his workmen to unnecessary risk.

In my opinion, therefore, the appeal fails. Not only with regard to loading ships, but in many other classes of work, such as works of construction or demolition, it must be impossible to lay down definite rules as to how the work is to be conducted or to proceed so as to afford safety to the workmen. The employer must lay out the job and take precautions according to the conditions which obtain and may vary from time to time, and whether his duty is discharged adequately in any particular case is a question of fact. But it is not discharged merely by leaving it to the discretion of another be he ever so competent.

Appeal dismissed.

Solicitors: *Gregory, Rowcliffe & Co., for Barrell, Son & Co., Liverpool; Silverman & Livermore, Liverpool and London.*

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Apr. 6, 7. Animals—Horses—Highway—Straying from adjacent land—Damage to motor-car—Negligence—Liability of owner.

While the plaintiff was driving his motor-car along the highway during the hours of darkness two horses belonging to the defendant passed through an open gate from a yard on the defendant's land on to the highway and came into collision with the plaintiff's car which was damaged. The farm-hand who had turned the horses out of their stable to water in the yard did not know that the gate was open, and there was no evidence of any special propensities in the horses. In an action for negligence :—

Held, that there was no evidence of negligence against the defendant.

The rule that there is no duty on the owner or occupier of land adjoining the highway to prevent animals on it from escaping on to the highway, criticized.

APPEAL from the Liverpool Court of Passage.

While the plaintiff was driving his motor-car along the highway during the hours of darkness two horses belonging to the defendant passed through an open gate from a yard on the defendant's land on to the highway and came into collision with the plaintiff's car which was damaged. The farm-hand who had turned the horses out of their stable to water in the yard did not know that the gate was open, and there was no evidence of any special propensities in the horses. The plaintiff brought this action in the Liverpool Court of Passage claiming from the defendant damages for negligence in (a) turning the horses loose into his yard to water without shutting the gate or otherwise preventing the horses from getting into the road or making provision for promptly rounding them up or turning them back into the yard; (b) not securing the heads of the horses by halters or otherwise before turning or leading them out of their stalls or permitting them to water in an open yard; (c) permitting the horses to be loose or uncontrolled on the highway during the "black-out"; (d) not having the horses under proper or any control having regard to all the circumstances of the case, more particularly the "black-out" conditions and the motor traffic to be anticipated on the said road; and (e) not giving warning to traffic approaching the farm that his horses were, or were

likely to be, loose on the said road. The presiding judge dismissed the action, and the plaintiff appealed.

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Wooll for the plaintiff. An owner of land adjoining a highway is not under any duty to members of the public using the highway to prevent harmless animals from straying on the highway: *Heath's Garage, Ltd. v. Hodges* (1), but the circumstances in the present case are very different from those in *Heath's Garage, Ltd. v. Hodges* (1) and *Ellis v. Banyard* (2), for such animals as lively horses are in a totally different category from harmless animals like sheep or cows. This case, too, can be distinguished from *Jones v. Lee* (3), for there the damage suffered by the plaintiffs was not a natural consequence of the defendant's putting the horse in a field with defective hedges. These horses were likely to do harm to persons on the highway, and, therefore, the defendant was under a duty to take reasonable precautions to prevent that harm being done: *Pinn v. Rew* (4); *Turner v. Coates*, per Lush J. (5); *Deen v. Davies* (6). The rule relied on by the defendant is not well adapted to modern conditions, and should not be extended. Its validity would seem to be open to question: *Brackenborough v. Spalding U.D.C.* (7).

Blackledge for the defendant. The defendant was under no duty to prevent the horses escaping on to the highway: *Heath's Garage, Ltd. v. Hodges* (1); *Brackenborough v. Spalding U.D.C.* (7). The rule referred to in those cases is binding on this court. There was no evidence of negligence on the part of the defendant.

Wooll replied.

LORD GREENE M.R. In my opinion, this court is bound by a rule of law which I dislike, but which has been stated or assumed to exist in several pronouncements of this court. The rule, as stated by Lord Wright in *Brackenborough v. Spalding U.D.C.* (7), is: "There is no duty on the owner or occupier of land adjoining the highway to prevent animals "on it from escaping on to the highway." That rule, as Lord Wright points out, is a modern one, so far as he knew. He comments on various matters which affect it, and indicates

(1) [1916] 2 K. B. 370.

(2) (1911) 106 L. T. 51.

(3) (1911) 106 L. T. 123.

(4) (1916) 32 T. L. R. 451.

(5) [1917] 1 K. B. 670, 674.

(6) [1935] 2 K. B. 282.

(7) [1942] A. C. 310, 321.

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that its existence, meaning and scope remain open to the consideration of the House of Lords, but I feel bound to approach the present case on the footing that the rule is binding on this court.

The rule appears to be ill adapted to modern conditions. A farmer who allows his cow to stray through a gap in his hedge on to his neighbour's land, where it consumes a few cauliflowers, is liable in damages to his neighbour, but if, through a similar gap in the hedge, it strays on to the road and causes the overturning of a motor omnibus, with death or injury to 30 or 40 people, he is under no liability at all. I scarcely think that that is a satisfactory state of affairs in the twentieth century. If it should prove not to be open to the House of Lords to deal with the rule, the attention of the legislature might be directed to considering the whole position with a view to ensuring the safety of His Majesty's subjects when they are lawfully using the highway.

It is recognized in all the cases relating to animals on a highway that there may be instances where special circumstances impose a duty. A special duty lies on a person who is in control of an animal on a highway if the animal is one which, by its nature or some special conditions affecting it, is liable to run wild, or to bite persons or other animals, or to toss them, as in the case of a cow with a calf. Similarly, I apprehend that, if the owner or occupier of land adjoining a highway chooses to put on to it an animal of such a nature or in such a condition that he knows, or ought to know, that, if it gets into the road, it will run amok, he must take special care to prevent it doing so. That, however, would appear to apply to the case of animals which may be expected actively to do something, such as to kick, or bite, or rush madly about, and not to apply when the only thing normally to be expected from the animal is to cause a blundering obstruction in the roadway. In *Heath's Garage, Ltd. v. Hodges* (1), Lord Cozens-Hardy M.R. said: "An animal like a sheep, by nature harmless, cannot fairly be regarded as likely to collide with a motor car, and the owner of the sheep cannot be held liable on that footing." That proposition appears strange when one considers the conditions of modern life. The sheep is regarded as being unlikely to collide with a motor-car, as might an unbroken colt, but the fact that the motor-car is likely to collide with the sheep seems to be regarded in law

(1) [1916] 2 K. B. 370, 376.

as a matter of no particular importance. However, there it is, and I cannot see any ground on which we can depart from the rule. It was suggested by Mr. Wooll that there was a difference between the depasturing of animals in a field and dealing with them in an enclosed yard. I cannot see any reason for that differentiation, nor can I see any reason for drawing a distinction between an open gate and a gap in a hedge, or one between the case where animals are left to themselves in a field adjoining the highway and that where they are there under the control of some person. Animals being driven into a field should be under the control of the person who is driving them, but, unless some action of that person is calculated to send them running into the road, I cannot see that the case in which an animal escapes while being driven can be differentiated from one where an animal happens to stray.

In the present case the only question is whether there were such special circumstances as to import a higher duty in the defendant than that which normally falls on the owner or occupier of roadside land on which animals are kept. We have to remember that what happened occurred in the hours of darkness, when the power of control was obviously less. The animals were set in motion by the farm-hand who got them out of the stable into the yard. I express no opinion on what the result might have been if he had deliberately opened the gate leading into the road at the time when, or just before, he let out the horses. It is possible that an inference might have been drawn that the combination of those actions made it natural and obvious that the horses would go out into the road. There was, however, no evidence how the gate came to be opened. It was normally kept shut, and no one knows who opened it. It might have been opened by somebody connected with the farm; but the facts are equally consistent with it having been opened by some unauthorized person. In this respect the facts of the present case bear a close resemblance to those of *Ellis v. Banyard* (1), a decision of this court in which Vaughan Williams L.J. and Kennedy L.J. approached the matter in a very cautious manner. Vaughan Williams L.J. said (2): "There is no evidence of any negligence on his [the defendant's] part at all. "I do not agree that the mere fact of the gate being found "open will make the defendant liable, unless it is proved that

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(1) (1911) 106 L. T. 51.

(2) Ibid. 52.

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"it was left open by his negligence." Whether that means "left open by his deliberate act," or whether the use of the word "negligence" by the learned lord justice imports something more, I am not clear. He goes on to say: "On the evidence as it stands the gate was left by the defendant in such a condition that it was quite safe, unless somebody out of mischief or mere thoughtlessness did something which would let the cattle out." Kennedy L.J. said that there was no evidence of negligence, and continued (1): "The fact that the defendant's gate was open threw no burden on him to show how it was open. The evidence is that it was a good gate and was properly closed at six that evening so as to prevent cattle coming out and molesting people." Buckley L.J. went further, because he said (1): "If, in fact, there were evidence that the defendant by his agent had left the gate open, it would not raise any implication of negligence against the defendant." Without going so far as Buckley L.J., and limiting myself to the view taken by Vaughan Williams L.J. and Kennedy L.J., I feel that there is no evidence in the present case that the defendant, by himself or his servants, was responsible for the gate being open. Whether or not the position would have been different if the evidence had shown that he was responsible must be regarded as uncertain. The illogical nature of the law as it stands at present, is shown by the fact that, apparently, you are not bound to have a gate or to repair gaps in your fences, but there seems to be a suggestion in *Ellis v. Banyard* (1) that, if you have a gate, it may be your duty to keep it shut.

However, all those matters I leave on one side. I cannot on the facts find sufficient special circumstances to raise a duty in the defendant to see that the gate was shut before the horses were let out of the stable. Anything less than that would not assist the present plaintiff, and this appeal must be dismissed.

MACKINNON L.J. I agree. By the statement of claim the plaintiff rests his case on an allegation of negligence on the part of the defendant. The first of the particulars of negligence specified was to the effect that he was negligent "in turning the said horses loose into his yard to water without shutting the gate, or otherwise preventing the horses from getting into the road." As the Master of the Rolls has

(1) 106 L. T. 51, 53.

pointed out, there was no evidence how the gate came to be open. In that respect and on the other particulars of negligence relied on the plaintiff, in my opinion, did not, in view of the authorities, establish any cause of action. I agree that the state of the authorities is unsatisfactory and that they seem to be ill adapted to the conditions of life in the twentieth century, but it is not for us to alter the settled law as laid down in those authorities. Possibly the House of Lords may be able to review them, or it may need legislation to adapt the common law to the conditions which rule to-day. As it is, I am afraid that we can only say that, on the authorities, the judgment of the learned judge in the court below was correct, and that this appeal fails.

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GODDARD L.J. I agree. I share to the full the feeling of my Lords that the law is unsatisfactory, and I hope that it may be possible some day for the House of Lords to review it. The rule that is binding on this court by reason of previous decisions is that an owner or occupier of land adjoining a highway is under no duty to fence so as to keep his animals off the highway. That must mean that he is under no duty to the users of the highway. If he is under no duty to keep his animals off the highway, it seems difficult to understand how negligence comes into the picture at all, at any rate, negligence with regard to the opening or shutting of the gate, because a gate is only a part of a fence. If he is under no duty to fence, I have the greatest difficulty—in spite of the views expressed obiter, as I think, by Vaughan Williams L.J., in *Ellis v. Banyard* (1)—in seeing how it could possibly be said that he is under a duty to keep his gate shut. A different question may arise if he drives animals on to the highway, because there he is doing the deliberate act of taking an animal on to the highway, and it may be—I say no more than that—that thereby he makes himself liable.

It is not only with regard to animals on the highway that I think the law is in an unsatisfactory condition. The law with regard to the trespass of animals is also unsatisfactory, having regard to the mischief which they may do. In 1906, Parliament passed a Dogs Act under which the owner of a dog which bites sheep or cattle is liable, whether or not he knows the propensity of the dog, but a dog may still bite a human being and, if the owner can show that he did not know

(1) 106 L. T. 51, 52.

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of its propensity, the owner is not liable. Apparently, Parliament thought that sheep require more protection than human beings. If, as my Lord stated, a cow strays on to neighbouring land and eats a few cabbages the owner is liable, but if a man's dog enters a neighbour's house and does damage by wrecking a room, the owner of the dog is not liable because it was laid down in 1699 (and I think earlier) that "you shall not have trespass for the act of a dog." A short time ago this court had to deal with the case of a man who had been bitten by a camel in a zoological garden, but he was held not to be entitled to recover damages because the camel is a domestic animal and the particular camel was not known to be ferocious. I hope that when the Law Revision Committee meets again after the war, if no other step has been taken in the meantime, it may be possible to bring before it the law with regard to animals, and, if necessary, have it altered by legislation. In the present case, however, I agree that we have no option but to dismiss the appeal.

Appeal dismissed.

Solicitors for plaintiff : *Silverman & Livermore, Liverpool.*

Solicitor for defendant : *E. R. Hoskinson, Liverpool.*

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WHITTEN v. ARMY AND NAVY STORES, LIMITED.

May 14, 17,
18, 20.

Factory Acts—Dangerous machinery—Fencing—Modification of Act by regulations—Circular saw—Woodworking Machinery Regulations, 1922 (St. R. & O. 1922, No. 1196), regs. 10, 21—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 67), s. 14, sub-s. 1.

Reg. 10 of the Woodworking Machinery Regulations, 1922, made under s. 79 of the Factory and Workshop Act, 1901, prescribes guards required for use with a circular saw. By reg. 21 : "The guards and other appliances required by these regulations shall be maintained in an efficient state and shall be constantly kept in position while the machinery is in motion, except when, owing to the nature of the work being done, the use of the guards or appliances is rendered impracticable . . . " :—

Held, that, by the combined effect of s. 60, sub-s. 2 (c), and the proviso to s. 159, sub-s. 1, of the Factories Act, 1937, the provisions of that Act could be modified by the regulations of 1922, but nothing in reg. 21 modified the provisions of s. 14, sub-s. 1, of the Act with respect to the secure fencing of dangerous machinery.

ACTION tried by Wrottesley J.

The plaintiff, a cabinet maker in the woodworking department of the defendants' factory, claimed from the defendants damages for negligence and breach of statutory duty under s. 14 of the Factories Act, 1937 (1). On May 4, 1942, he was instructed to do certain work which entailed the use of a circular saw, admittedly a "woodworking machine," within the meaning of the Woodworking Machinery Regulations, 1922, which was provided with a guard which did not comply with the specification laid down in reg. 10 of those regulations. Owing to the nature of the work being done the use of this guard was impracticable. The plaintiff, therefore, used the saw without any guard, his right hand came in contact with it and he was injured. The defendants, by their defence, denied negligence and breach of statutory duty and they relied on reg. 21 of the Woodworking Machinery Regulations, 1922 (2).

(1) By Factories Act, 1937, s. 14, sub-s. 1: "Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced: Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this subsection shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part."

By s. 60, sub-s. 1: "Where the Secretary of State is satisfied that any manufacture, machinery, plant, process, or description of manual labour, used in factories is of such a nature as to cause risk of bodily injury to persons employed in connexion therewith, or any class of those

"persons, he may, subject to the provisions of this Act, make such special regulations as appear to him to be reasonably practicable and to meet the necessity of the case." By sub-s. 2: "Special regulations so made may, among other things . . . (c) modify or extend with respect to any class or description of factory any provisions of Part I., Part II. or this Part of this Act, being provisions imposing requirements as to health or safety; and may impose duties on owners, employed persons and other persons, as well as on occupiers." [Section 14 is in Part II. of the Act.]

By s. 159, sub-s. 1, the enactments set out in sch. IV. are repealed, provided that: "any . . . regulation . . . made . . . under any enactment repealed by this Act which is in force at the commencement of this Act shall continue in force and shall have effect as though it had been made . . . under this Act, . . ."

(2) The regulation is set out in the headnote.

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Montague Berryman for the defendants. There was no duty on the defendants under s. 14 of the Factories Act, 1937, to fence this circular saw securely. Clearly there was no duty under reg. 10 of the Woodworking Machinery Regulations, 1922, to fence the saw because, owing to the nature of the work being done, the use of the guards prescribed by reg. 10 was rendered impracticable: see reg. 21. The case coming within this exception, there was no breach by the defendants of their duty at common law to exercise reasonable care. The mere fact that the nature of the work rendered the use of the guards impracticable does not render the defendants liable at common law if they permit the use of a circular saw, although the fact that it was impracticable to use guards would not justify the use of any machine for any work, however dangerous it may be. With regard to the alleged breach of statutory duty, reg. 21 of the Woodworking Machinery Regulations modifies the duty otherwise cast on the defendants by s. 14 of the Factories Act, 1937, to fence securely this saw. It is true that in *Lewis v. Denye* (1) Tucker J. expressed the view that the obligation imposed by s. 10 of the Factory and Workshop Act, 1901 (the predecessor of s. 14 of the Act of 1937) could not be given a restricted interpretation in the light of the Woodworking Machinery Regulations, 1922, but, in the House of Lords, Viscount Simon L.C., when reserving his opinion (2) as to the correctness of the view expressed by Salter J. in *Davies v. Thomas Owen & Co., Ltd.* (3), which interpreted s. 10 as meaning that, if a machine could not be securely fenced while remaining commercially practicable or mechanically useful, the statute in effect prohibited its use, indicated that, in his view, the terms of the Act of 1937 must be subject to practical modification. It would appear that the Secretary of State thought that he had power by regulations made under s. 79 of the Act of 1901 to modify the terms of that Act: see the proviso to "exemptions" in the Horizontal Milling Machines Regulations, 1928. It may be that the Secretary of State had no power by a regulation made under s. 79 of the Factory and Workshop Act, 1901, to modify any section of the Act of 1901, but by the combined effect of s. 60, sub-ss. 1 and 2 (c), and s. 159, sub-s. 1, of the Act of 1937, the Woodworking Machinery Regulations, 1922, may modify the terms of s. 14 of that Act. The only practical interpretation

(1) [1938] 2 All E. R. 817.

(3) [1919] 2 K. B. 39, 41.

(2) [1940] A. C. 932.

of the section and the regulations, taken together, is that the regulations modify the provisions of the section, and, in effect, take the place of the provisions of the section with regard to fencing or guarding circular saws.

Edgedale for the plaintiff. No doubt the Secretary of State has power by special regulations made under s. 60, sub-s. 2 (c), of the Factories Act, 1937, to modify a provision of that Act, but he had no power under s. 79 of the Act of 1901 by regulations to modify any provision of that Act: see the view of Tucker J. in *Lewis v. Denye* (1). The regulations of 1922, made under s. 79 of the Act of 1901, which could not modify s. 10 of the Act of 1901, cannot modify s. 14 of the Act of 1937, for regulations made under s. 60 of the Act of 1937 must be laid before Parliament and either House may resolve that they be annulled: s. 129, sub-s. 1 (a), of the Act of 1937. When the regulations of 1922 were laid before Parliament under s. 84 of the Act of 1901 they could not modify the provisions of that Act. Regulation 21, therefore, on the basis that it modifies s. 14 of the Act of 1937 has never been laid before Parliament. If the Secretary of State had wished to modify or repeal s. 14 of the Act of 1937, he could have made a regulation to that effect under s. 60, and the new regulations would then have been laid before Parliament. Even if the regulations of 1922 could have modified the provisions of s. 14 of the Act of 1937, it is plain, on construction, that they have not done so. There is no reason why the regulations of 1922 and s. 14 should not stand together with the meaning that a circular saw must be guarded in a particular way by the type of fencing described in reg. 10 of the regulations of 1922, if that can be done. If that cannot be done, the general provision that the machine shall be securely fenced, survives. The defendants failed in their duty to the plaintiff at common law to exercise due care and skill and to supply proper plant and a safe system of working: *Wilsons and Clyde Coal Co., Ltd. v. English* (2).

Cur. adv. vult.

May 20. WROTTESELEY J. read the following judgment. The plaintiff contends that the defendants should make good to him the damage he has suffered on two grounds. As regards the first, namely, the common law duty of the defendants to supply proper plant and a safe system of working, I do not

(1) [1938] 2 All E. R. 817. (2) [1938] A. C. 57.

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think that the defendants neglected their common law duty, unless it can be said that in no event is an employee to be asked to use a tool or machine which is dangerous.

That leaves the other ground, namely, the admitted fact that this saw was not guarded in any way, either in the manner laid down in s. 14, or by a guard as specified in reg. 10 of the Woodworking Machinery Regulations, 1922, which, admittedly, apply to this case. It is clear that the job which the plaintiff was doing could not have been done if the saw had been guarded in the manner prescribed by the regulation. Nor in the light of then knowledge was any guard shown to have been devised which could have been installed instead of that prescribed and used in the doing of this kind of work so as to come within the proviso to s. 14, sub-s. 1, of the Factories Act, 1937. It is clear that the defendants, in allowing the plaintiff to use the circular saw unguarded, were neither complying with s. 14 nor with those parts of reg. 10 which prescribe guards, but they claim that they are not in breach of their statutory duties by reason of the provision of reg. 21. There is no doubt that here was an occasion when, to use the words of reg. 21, "owing to the nature of the work being done," the use of the guards required by the regulations was rendered impracticable. Therefore, say the defendants, we cannot be said to be acting in breach of the Woodworking Machinery Regulations, 1922. As to the provisions of s. 14, the defendants say that the effect of the regulations, and particularly of reg. 21, is to modify that section so as to make it unnecessary to use a guard, when the use of the guard prescribed by the regulations is rendered impracticable by the nature of the work to be done. By s. 60 of the Factories Act, 1937, the Secretary of State was empowered by special regulations to modify, among other parts of the Act, s. 14. It is true that the Woodworking Machinery Regulations, 1922, were not made after this power was given to the Secretary of State, but before; but the proviso to s. 159, sub-s. 1, of the Act which repeals the former Factory and Workshops Acts, provides that: "any . . . regulation . . . made . . . under "any enactment repealed by this Act which is in force at "the commencement of this Act shall continue in force and "shall have effect as though it had been made or given under "this Act." If, therefore, there should be in the Woodworking Machinery Regulations, 1922, provisions which purport to modify s. 14 of the Act of 1937, which is practically the same

as s. 10 of the Act of 1901, a cloak is thrown over their validity. The Secretary of State now has statutory sanction for doing that which it is doubtful whether he could do before. He can now, if he likes, make regulations, compliance with which will excuse the occupier who obeys them from the apparently absolute obligation contained in s. 14 to fence securely every dangerous part of machinery. On the other hand, he can, when he makes regulations, make it clear that they do not supersede that absolute obligation, and my attention was drawn to regulations promulgated since the Act of 1937, in which he has done this.

It was argued on behalf of the plaintiff that, notwithstanding the clear words of s. 159 of the Act of 1937, it was repugnant to common sense that these words should be used to justify a modification of the Act so recently passed by a set of regulations which were made before the Act, and in respect of which Parliament has never had the opportunity of annulling them afforded by s. 129. That, however, appears to me to be an argument which might with more propriety have been addressed to Parliament when the clause which became s. 159 was under discussion than to the court which has to construe that section.

If, therefore, I find in the regulations a clear intention to modify the provisions of s. 14 of the Act, I must accept the position, but, in fact, I find no such intention. Read carefully, reg. 21 excuses the defendants in this case from keeping in position the guards specified in the regulations, that is to say, in reg. 10, and if the plaintiff had been forced to rely on the absence of such a guard, as being the cause of his accident, the defendants would have had a good answer in the exception contained in reg. 21. The plaintiff, however, is not obliged to rely on this. On his behalf it is claimed that the defendants had not complied with s. 14. They had not, even by using the guards specified in the Woodworking Machinery Regulations, 1922, placed themselves in the position of the defendants in *Lewis v. Denye* (1), that is to say, of providing the guards specified or the best known guards.

It is, at any rate, arguable that the occupiers of a factory who set up and maintain the guards specified in the Woodworking Machinery Regulations, 1922, have complied with the obligation intended to be imposed by s. 14, in the absence of some provision in the regulations to indicate that the general

(1) [1940] A. C. 921.

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obligation in s. 14 was not to be regarded as superseded, but it is a long stride from that proposition to claim that the regulation which permits the occupier to dispense with the guards specified in the regulations where their use is impracticable impliedly sets the occupier free from the obligations laid down in s. 14. For this would, apparently, justify the provision of no guard at all wherever the specified guard is unsuitable. This cannot be right.

It may be true that in the result the court is bound to hold something perilously near to the proposition underlying the decision of Salter J. in *Davies v. Thomas Owen & Co., Ltd.* (1), namely, that commercial considerations are irrelevant and that, in so far as a machine cannot be used so as to comply with s. 14, it must not be used at all. I have had it pointed out to me that in *Lewis v. Denye* (2), Lord Simon L.C. appeared to doubt the soundness of that proposition, and that the House of Lords must be taken to have reserved their opinion on it, but since the date of the plaintiff's injury in that case, by the Act of 1937, the legislature has apparently confided these matters to what must be regarded as the most suitable person, seeing that they are largely matters of policy and expediency, namely, to a minister of the Crown answerable to Parliament. It did this doubtless in order to deal with the serious question to which the Lord Chancellor alluded. Henceforward, it must, I think, be taken that Parliament has meant s. 14 to stand as an absolute obligation except in those cases where the Secretary of State has by regulation chosen to modify that obligation. As a result, the plaintiff is entitled to succeed, and there must be judgment for him for 1437*l.* 17*s.* damages, with costs.

Judgment for the plaintiff.

Solicitors for the plaintiff: *Shaen, Roscoe & Co.*

Solicitors for the defendants: *Blount, Petrie & Co.*

(1) [1919] 2 K. B. 41.

(2) [1940] A. C. 921.

C. G. M.

HOLLINGTON v. F. HEWTHORN AND COMPANY, C. A.
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May 7, 11,
12, 28.

Evidence — Admissibility — Conviction — Motor-cars in collision —

Negligence alleged against defendant driver—Evidence of conviction of defendant driver of careless driving—Res inter alios acta—Statement by person interested—Death of driver of plaintiff's car after action brought—Evidence of statement made by driver of plaintiff's car to police on day of collision—"Statement made . . . at a time "when proceedings were pending or anticipated"—Evidence Act, 1938 (1 & 2 Geo. 6, c. 28), s. 1, sub-s. 3.

In an action arising out of a collision between two motor-cars on the highway in which the plaintiff alleged negligence on the part of the defendant driver the plaintiff sought to give evidence of—(a) a conviction of the defendant driver of careless driving, contrary to s. 12, sub-s. 1, of the Road Traffic Act, 1930, at the time and place of the collision, and (b) of a statement made to a police constable by the driver of the plaintiff's car (who had died after action brought) after the collision and after the constable had warned him, in accordance with s. 21 (a) of the Act, that the question of prosecuting him for reckless, dangerous, or careless driving would be considered:—

Held, (a) that, both on principle and authority, evidence of the conviction was inadmissible.

In the Estate of Crippen [1911] P. 108; *Partington v. Partington and Atkinson* [1925] P. 34; and *O'Toole v. O'Toole* (1926) 42 T. L. R. 245, overruled on this point.

(b) that, whether or not a statement made to a police officer, who is inquiring into the facts of a road accident, is admissible under s. 1, sub-s. 1, of the Evidence Act, 1938, depends, under s. 1, sub-s. 3, of the Act, on whether the person making it is a "person interested" and on whether proceedings are pending or anticipated which would involve a dispute as to any fact which the statement might tend to establish, regarding which no inference is necessarily to be drawn from the giving of the warning under s. 21 of the Road Traffic Act, 1930, that warning being of a different nature from the warning given to a suspected person under the judges' rules, as in *Robinson v. Stern* [1939] 2 K. B. 260, but in the present case the terms of the statement justified the inference that the person making it anticipated civil proceedings at least, and it was, therefore, rightly held to be inadmissible.

Decision of Hilbery J., ante p. 27, on these points affirmed, but on the facts reversed.

APPEAL from Hilbery J.

The plaintiff, Robert Henry Hollington, the owner of a motor-car, sued as the administrator of the estate of his son, Basil Thomas Edmund Hollington, who had died after action

C. A. brought, and on his own behalf, claiming damages in respect
 1943 of a collision which occurred at Abridge, Essex, on April 5,
 HOLLINGTON 1940, between the plaintiff's car, driven by B. T. E. Hollington,
 v. and a car owned by the first defendants, F. Hewthorn & Co.,
 F. HEW- Ld., and driven by the second defendant, Ernest Arthur Poll.
 THORN & Co. The defendants denied negligence on the part of the second
 defendant and pleaded contributory negligence. Owing to the
 death of B. T. E. Hollington, the plaintiff was unable to adduce
 any direct evidence of the accident, and he tendered in evidence,
 in addition to evidence as to the position and condition of
 the two vehicles after the collision, (a) a conviction of the
 defendant, Poll, for careless driving at the time and place
 of the collision, under s. 12 of the Road Traffic Act, 1930;
 (b) a statement made by B. T. E. Hollington to a police
 constable after the collision, and after the constable had
 warned him, in accordance with s. 21 (a) of the Act, that the
 question of prosecuting him for reckless, dangerous, or careless
 driving would be considered. Hilbery J. ruled that neither
 was admissible—(a) as being *res inter alios acta*; (b) as having
 been made at a time when proceedings were "anticipated,"
 and, therefore, being expressly excluded by s. 1, sub-s. 3, of
 the Evidence Act, 1938 (1). On a submission of "no case"
 by the defendant, who called no evidence, Hilbery J. ruled that
 the plaintiff had established a *prima facie* case of negligence,
 and gave judgment in his favour for 100*l.* on his claim as
 administrator, and for 90*l.* 17*s.* 6*d.* on his own claim. The
 defendants appealed.

Casswell K.C. and *Holroyd Pearce* for defendants. There
 was no evidence to justify an inference of negligence by the
 defendant, Poll.

Denning K.C. and *Harold Simmons* for plaintiff. There
 are three questions which may fall for decision: (1.) Whether
 on the whole case it was a legitimate inference that the
 defendant was negligent. If so, there is an end of the matter.
 If not, (2.) Whether a conviction of the defendant of careless
 driving was admissible at common law; and (3.) Whether the
 statement made to the police by the deceased was admissible

(1) By s. 1, sub-s. 3, of the Evidence Act, 1938: "Nothing
 "in this section shall render
 "admissible as evidence any state-
 "ment made by a person inter-
 "ested at a time when proceedings
 "were pending or anticipated
 "involving a dispute as to any
 "fact which the statement might
 "tend to establish."

under the Evidence Act, 1938. As to (1.) Hilbery J. was entitled to draw the inference which he drew, and the question is only whether it could legitimately be drawn, not whether this court would have drawn it. With regard to (2.), Hilbery J. ruled that the conviction was inadmissible as *res inter alios acta*. It is true that it would create no estoppel, but it is submitted that it was admissible in chief as *prima facie* evidence of the defendant's negligence. From the beginning of the eighteenth century a conviction was held admissible in subsequent civil proceedings so long as it was not founded on the evidence of the party suing. The exception was due to the fact that to admit the conviction in such a case would have been an indirect way of circumventing the disability of the party as a witness. Differences of opinion on this subject, however, are found among the greatest names. Gilbert C.B., who died in 1726, states the rule as above in his work on Evidence, 2nd ed., p. 30, sub tit. "Verdicts given in evidence." That was the standard work throughout the eighteenth century, and it is highly praised by Blackstone (Commentaries, 8th ed., bk. III., c. 23, p. 367). In *Gibson v. M'Carty* (1) Lord Hardwicke rejected evidence of a conviction because it might have rested on the evidence of the party. It is true that in *Rex v. Warden of the Fleet* (2) this class of evidence was said to be inadmissible, but in all the books that case is not referred to, and in *Rex v. Lyme Regis* (3) Buller J. said "12 Mod. is not a book of any authority." On the other hand, Buller's *Nisi Prius*, 7th ed., p. 245, puts the matter too favourably to the plaintiff when it refers to a conviction as *conclusive* evidence. That it clearly is not. [They referred to Peake on Evidence, Preface to 2nd ed., 1804; *Smith v. Rummens* (4); *Hathaway v. Barrow* (5); *Wilkinson v. Gordon* (6); *Blakemore v. Glamorganshire Canal Co.* (7); *Justice v. Gosling* (8).]

The disability of parties and their spouses was taken away by the Evidence Acts, 1851 and 1853, but, as the accused person could not give evidence in a criminal cause till 1898, it might have been said before that date to be unfair to allow evidence of a conviction to be given. In *In the Estate of Crippen* (9)

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(1) (1736) Cases temp. Hardwicke 311.

(6) (1824) 2 Addams, 152, 160, 161.

(2) (1699) 12 Mod. 337.

(7) (1835) 2 C. M. & R. 133.

(3) (1779) 1 Doug. 79, 83.

(8) (1852) 12 C. B. 39.

(4) (1807) 1 Camp. 9, 11.

(9) [1911] P. 108.

(5) (1807) 1 Camp. 151.

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evidence that a husband had been convicted of murdering his wife was admitted, rightly, it is submitted, as evidence not only of the fact of conviction, but of the murder. *In the Estate of Crippen* (1) was followed by *Ridley J. in Mash v. Darley* (2), which was affirmed on different grounds. *Partington v. Partington and Atkinson* (3) and *O'Toole v. O'Toole* (4) are difficult to reconcile with the view that a conviction is inadmissible. A verdict of acquittal might also be admissible, but, owing to the burden of proof resting on the prosecution, its weight might be less. The verdict of a coroner's jury is not admissible: *Barnett v. Cohen* (5), which is merely cited to distinguish it. [They also cited *Rex v. General Medical Council. Ex parte Spackman* (6) and the notes to *The Duchess of Kingston's Case* (7).] There is another branch of the law that supports the plaintiff's contention that the conviction of the defendant is admissible. When a felony is committed which also inflicts a civil wrong, no civil action can be brought by the person injured until the felon has been prosecuted: see *Smith v. Selwyn* (8) and *The Amerika* (9). It is submitted that where the person injured has been so delayed in bringing his civil action that an important witness has died, he must be able to rely on the conviction obtained on the witness's evidence, as prima facie evidence in his action. For a conviction not to be admissible in such a case would be contrary to justice. Cases which are said to be exceptions to the general rule that convictions are not admissible in a civil actions as being *res inter alios acta* are *Davis v. Nest* (10), *Eaton v. Swansea Waterworks Co.* (11) and *Petrie v. Nuttal* (12). These cases are, however, really examples of the general rule that a conviction is prima facie evidence in a civil action. The decision of a judicial tribunal, after going thoroughly into the evidence, and after full opportunity for the prisoner to give evidence, must be admissible in evidence. Since *Harvey v. Regem* (13) was decided in 1901, there has been a universal tendency to admit a conviction as prima facie evidence.

On the second question, whether the statement made to the

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| (1) [1911] P. 108. | (7) (1776) 2 Sm. L. C., 13th ed., |
| (2) [1914] 1 K. B. 1; in C. A. | 644, 667. |
| [1914] 3 K. B. 1226. | (8) [1914] 3 K. B. 98. |
| (3) [1925] P. 34. | (9) [1917] A. C. 38, 50. |
| (4) (1926) 42 T. L. R. 245. | (10) (1833) 6 Car. & P. 167. |
| (5) [1921] 2 K. B. 461. | (11) (1851) 20 L. J. (Q. B.) 482. |
| (6) [1942] 2 K. B. 261. | (12) (1856) 25 L. J. (Ex.) 200. |
| | (13) [1901] A. C. 601. |

police was admissible, Hilbery J. went too far in holding that after an accident on the highway proceedings must be anticipated. The existence of "knock for knock" agreements between insurance companies normally comes in to prevent proceedings. A statement made by a party before he has an opportunity of thinking out his case may be of great value. Further, s. 1, sub-s. 3, of the Evidence Act, 1938, does not say "when proceedings were . . . reasonably anticipated" and the proceedings "anticipated" must be anticipated by the person making the statement, and involve a dispute as to some fact dealt with in the statement. *Robinson v. Stern* (1) is clearly distinguishable from the present matter. There there was a caution under the judges' rules, and when a constable has made up his mind to prefer a charge and so administers that caution it is clear that proceedings are anticipated. The statutory warning under s. 21 (a) of the Road Traffic Act, 1930, however, is very different. It is merely that the question of a prosecution "will be considered," and no one can then say whether consideration will lead to proceedings or not. It does not without more involve an inference that proceedings are anticipated. Where a witness is alive, the question whether he anticipated proceedings can be investigated as a question of fact, but where he is dead his statement should not be excluded without strict proof that proceedings were anticipated.

Casswell K.C. in reply. The plaintiff is asking the court to make a revolutionary change in the law of evidence as it has stood for two-and-a-half centuries. The issue before the magistrates who convicted the defendant, Poll, was a different issue from that before Hilbery J. Any principle laid down for the admission of evidence ought not to cover a case where the res is different. It is not sufficient to say "pars rei is the same." If a conviction is to be admissible, the best evidence of it must be given. The best evidence would be to call as a witness each magistrate who would say: "I heard So-and-so say such and such"—which would be hearsay—"and as a result I formed the opinion that the defendant was negligent"—thereby arrogating to himself the decision of the very question which the civil court has to decide. *Rex v. Warden of the Fleet* (2) is a full report, unlike the rest of the cases in 12 Modern Reports, and, moreover, it is reprinted in Cases determined by Sir John Holt,

(1) [1939] 2 K. B. 260.

(2) 12 Mod. 337; Holt, 133.

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C. A 1698-1710. The case is an authority that a conviction of battery is not evidence in an action for trespass for the same battery. [He referred to *Rex v. Horton* (1), and *Reg. v. Fontaine Moreau* (2).] The principle of *In the Estate of Crippen* (3) is not necessarily applicable in the King's Bench Division, and has been doubted even in the Probate, Divorce and Admiralty Division by Hill J., who followed it in the undefended case of *O'Toole v. O'Toole* (4), relying on *Partington v. Partington and Atkinson* (5). At best it amounts merely to a doubtful relaxation of the ordinary rule in a special class of case. As to the second point, if the judge had looked at the statement made by the deceased man, he would have found that a reasonable inference to be drawn from it was that he must have anticipated proceedings. Apart from *Robinson v. Stern* (6), the only authority appears to be *Plomien Fuel Economiser Co. v. National Marketing Co.* (7), which deals with interest, not anticipation.

Cur. adv. vult.

1943. May 28. The judgment of the court was read by GODDARD L.J. who, after stating the facts and reviewing the evidence, continued: The plaintiff not only seeks to uphold the judgment for the reasons given by Hilbery J., but he also contends that evidence tendered by him was wrongly excluded. He, therefore, asks that, if this court should find that there was no evidence to support the judgment, there should be a new trial at which evidence tendered by him and rejected could be given. Hilbery J. held that the plaintiff had established a case. We are unable to agree that this inference was justified. On the evidence which was before him we do not think that a finding of negligence against the defendant can be supported.

The evidence which was rejected by the judge and which Mr. Denning contends ought to have been received was, first, a certificate that the defendant, Poll, had been convicted of driving without due care and attention on the day and in the parish in question, and, secondly, the signed statement made by the deceased driver to the police constable soon after the accident, which, it is said, is made evidence by the Evidence

(1) (1817) 4 Price 150.

(2) (1848) 11 Q. B. 1028.

(3) [1911] P. 108.

(4) 42 T. L. R. 245.

(5) [1925] P. 34.

(6) [1939] 2 K. B. 260.

(7) [1941] Ch. 248.

Act, 1938. Hilbery J. rejected the first on the ground that it was *res inter alios acta*, and he held that he was precluded from admitting the second by the judgment of this court in *Robinson v. Stern* (1).

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Dealing first with the conviction, Mr. Denning contends that, as he has to prove negligence as part of his case, he is entitled to put in the conviction, not as conclusive, but as *prima facie* evidence that the defendant was driving negligently. He admits that he must prove by oral evidence, if it is not admitted, that the defendant is the person who was convicted, and also, as we understand his argument, that he would in some manner have to identify the negligence of which the defendant was convicted with that which caused the accident. The conviction will then still not be an estoppel, and it will be open to the defendant to show, if he can, that he ought not to have been convicted or that the negligence of which he was convicted did not cause the accident, but Mr. Denning says that the fact of his conviction is *prima facie* evidence that the defendant was guilty of negligence.

Many years ago in *Isherwood v. Oldknow* (2) Lord Ellenbrough, when considering the maxim "*Communis error facit jus*," said that it was more true to say that "*Communis opinio* is evidence of what the law is," and the first observation we would make on this part of the case is that it has been the invariable practice of the judges for many years, certainly for so long as any member of the court has been in the profession, to reject this class of evidence, so that nowadays counsel have ceased to tender it in accident cases. It is, of course, no reflection on counsel in this case that they contended for its admission, because here there is the unfortunate fact that the material witness is dead and they had to consider whether there was evidence which, according to the rules of law, was admissible, whatever the prevailing practice might be, but where it is clear that over a long period there has been a unanimous opinion, not only of most modern text-book writers, but among judges of first instance, that some particular class of evidence is inadmissible, the court should be slow to differ from it unless it can be clearly shown that the *communis opinio*, which we are satisfied has hitherto prevailed, is based on wrong premises.

Before dealing with the authorities, let us consider the question in the light of the principles of modern law relating

(1) [1939] 2 K. B. 260.

(2) (1815) 3 M. & S. 382, 396.

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to evidence and see whether they support the admissibility of the conviction on such an issue as arises in this case. We say "of modern law" because in former days, it is fair to say, the law paid more attention to the competency of witnesses than to the relevance of testimony. We are apt to forget that it was not only the parties who were incompetent, but also any person who was or could be interested in the question at issue, so that parties would sometimes go to court with releases already executed under seal ready to be tendered to a witness to free him from any possible obligation that might prove an objection to his giving evidence. It was not till the Evidence Act, 1843, that interested witnesses, other than the parties, their husbands and wives, were rendered competent, and by the Evidence Act, 1851, the parties, and by the Evidence Amendment Act, 1853, their spouses, were at last enabled to give evidence. The law being what it was before these statutes were passed, it is not surprising to find Sir FitzJames Stephen saying, in his Digest of the Law of Evidence, 12th ed., p. 217, Note XVIII., that the law of competency "was formerly the most, or nearly "the most important and extensive branch of the law of "evidence," and that rules of incompetency are "nearly "the only rules of evidence treated of in the older authorities." But, nowadays, it is relevance and not competency that is the main consideration, and, generally speaking, all evidence that is relevant to an issue is admissible, while all that is irrelevant is excluded.

Is it, then, relevant to an issue whether the defendant, by negligent driving, collided with and thereby injured the plaintiff, to prove that he had been convicted of driving without due care and attention on the occasion when the plaintiff was injured? As stated above, Mr. Denning admits that he would have to identify the negligent driving which formed the subject of the charge with that which caused the injury to the plaintiff, for the record of the conviction itself would show no more than that the defendant was convicted for so driving on a certain day and in a certain parish or place. In truth, the conviction is only proof that another court considered that the defendant was guilty of careless driving. Even were it proved that it was the accident that led to the prosecution, the conviction proves no more than what has just been stated. The court which has to try the claim for damages knows nothing of the evidence that was

before the criminal court. It cannot know what arguments were addressed to it, or what influenced the court in arriving at its decision. Moreover, the issue in the criminal proceedings is not identical with that raised in the claim for damages. Assume that evidence is called to prove that the defendant did collide with the plaintiff, that has only an evidential value on the issue whether the defendant, by driving carelessly, caused damage to the plaintiff. To link up or identify the careless driving with the accident, it would be necessary in most cases, probably in all, to call substantially the same evidence before the court trying the claim for personal injuries, and so proof of the conviction by itself would amount to no more than proof that the criminal court came to the conclusion that the defendant was guilty. (It is admitted that the conviction is in no sense an estoppel, but only evidence to which the court or a jury can attach such weight as they think proper, but it is obvious that once the defendant challenges the propriety of the conviction the court, on the subsequent trial, would have to retry the criminal case to find out what weight ought to be attached to the result. It frequently happens that a bystander has a complete and full view of an accident. It is beyond question that, while he may inform the court of everything that he saw, he may not express any opinion on whether either or both of the parties were negligent. The reason commonly assigned is that this is the precise question the court has to decide, but, in truth, it is because his opinion is not relevant. Any fact that he can prove is relevant, but his opinion is not. The well recognized exception in the case of scientific or expert witnesses depends on considerations which, for present purposes, are immaterial. So, on the trial of the issue in the civil court, the opinion of the criminal court is equally irrelevant. Another rule of general application is that only the best evidence is admissible. Where the only witness to a fact is dead, a party is often placed in great difficulty, but, with certain well-settled exceptions, the death of a witness does not on that account render admissible evidence that would be objectionable if he were still alive. These exceptions are (1.) dying declarations, in the case only of murder or manslaughter; (2.) declarations in the course of business or professional duty; (3.) declarations against interest; (4.) declarations by testators as to contents of their wills in certain cases; (5.) declarations as to public and general rights, but

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C. A. 1943 } not as to particular facts from which a right or custom can be proved; and (6.) certain declarations as to pedigree. To these must be added certain statutory provisions as to putting in depositions taken under the Indictable Offences Act, 1848, and also statements now made evidence under the Evidence Act, 1938, but none of these matters relate to the subject that we have now to consider, and the fact that the plaintiff's son has since died affords no ground for allowing a conviction, which would not have been evidence had he been alive, to be now put in. Hilbery J. rejected the conviction on the ground that it was *res inter alios acta*, which is the reason generally given for not admitting that class of evidence. No doubt, it is difficult for a layman to understand why it is that if A prosecutes B, say, for doing him grievous bodily harm, and subsequently brings an action against him for damages for assault, this doctrine should apply so that he cannot use the conviction as proof that B did assault him. The "*alios*" can only be the Crown who, in the case of what is commonly called a private prosecution, is no more than the nominal prosecutor. It is for this reason that we have stressed the question of relevancy, and, indeed, it is relevancy that lies at the root of the objection to the admissibility of the evidence. Other reasons can, of course, be given for the rule, and in other cases would have great force. A judgment obtained by A against B ought not to be evidence against C, for, in the words of the Chief Justice in the *Duchess of Kingston's Case* (1), "it would be unjust to bind any person who could not be "admitted to make a defence, or to examine witnesses or to "appeal from a judgment he might think erroneous: and "therefore . . . the judgment of the court upon facts found, "although evidence against the parties, and all claiming "under them, are not, in general, to be used to the prejudice "of strangers." This is true, not only of convictions, but also of judgments in civil actions. If given between the same parties they are conclusive, but not against anyone who was not a party. If the judgment is not conclusive we have already given our reasons for holding that it ought not to be admitted as some evidence of a fact which must have been found owing mainly to the impossibility of determining what weight should be given to it without retrying the former case. A judgment, however, is conclusive as against all persons of the existence of the state of things which it actually

(1) (1776) 2 Sm. L. C., 13th ed., 644.

affects when the existence of that state is a fact in issue. Thus, if A sues B, alleging that owing to B's negligence he has been held liable to pay x*l.* to C, the judgment obtained by C is conclusive as to the amount of damages that A has had to pay C, but it is not evidence that B was negligent: see *Green v. New River Co.* (1), and B can show, if he can, that the amount recovered was not the true measure of damage.

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We now turn to the authorities. Mr. Denning first relies on certain passages in Gilbert on Evidence, described by Blackstone as an excellent treatise which it is impossible to abstract or abridge without losing some beauty and destroying the chain of the whole: Commentaries, 8th ed., bk. III., chap. 23, p. 367. The author had long judicial experience as Lord Chief Baron, both in Ireland and in England, and his writings have always been held in high repute. This book, however, has, from the point of view of the modern lawyer, the disadvantage already referred to that it deals so much more with competency than any other subject. On the point we are now discussing the learned author lays down that a verdict on an indictment shall not be given in evidence if found only on the oath of the party in the cause, for that would enable him to give evidence indirectly on his own behalf, but he maintains that, if the verdict was found partly on other evidence, it is admissible and ought to sway in the determination of the same fact, whether the verdict be on an indictment or action. It may be diminished in point of authority, he says, by showing that it was in part founded on the oath of the party, and the jury are to respect it no further than they presume it given on the credit of the other witnesses. The learned author cites no authority for this opinion other than stating: "This is the practice ex relatione Mr. Phipps '1700" (which was only two years after Gilbert was called to the bar), and it would seem to confront a jury with an impossible task. The editor of the seventh edition of Buller's *Nisi Prius* evidently took the view that a verdict obtained even in part on a party's evidence, could not be admitted: see p. 245, note (a), and it is fair to say that he gave no clear assistance on the matter one way or the other. The note to which reference has just been made and for which Bridgman, who edited the seventh edition is responsible, says: "the effect "of verdicts in criminal cases on the civil rights of the parties

C. A. "does not appear to be clearly settled." (1). This was the
 1943 view of the author of Peake on Evidence, as is shown in his
 HOLLINGTON preface to the second edition published in 1808, and at p. 46
 v. he sums up the cases to which he has referred in the earlier
 F. HEW- pages by saying that they seem to show that such evidence
 THORN & CO. is in no case admissible although he says "this is opposed
 "to the dictum of Gilbert." Starkie, writing in 1833, says
 (2nd ed., vol. i., p. 235): "As a general rule it seems that a
 "verdict or judgment in a criminal case is not evidence of
 "the fact upon which the judgment was founded, in a civil
 "proceeding." For this he cites *Rex v. Warden of the Fleet* (2).
 It is true that Modern Reports have been said to be of little
 or no authority, but this case is also reported in almost
 precisely the same terms in the volume of reports that bears
 the name of Sir John Holt, and, unlike many of the cases in
 this series, this is a full report and, as we have just said, is
 treated as an authority by Starkie. In the case as reported
 it was laid down by the full court in a trial at bar that a
 conviction could be no evidence against the warden on a debt
 on a bond, nor for the prisoner in false imprisonment against
 the warden, because it would not be between the same parties,
 for conviction at the suit of the King for battery cannot be
 given in evidence in an action for trespass for the same battery.
 The next case is *Gibson v. M'Carty* (3), where the admission
 of a conviction was opposed on the ground that it might
 have been obtained on the evidence of the party. Lord
 Hardwicke, then Lord Chief Justice of the King's Bench,
 rejected the evidence on this ground, but referred to a case
 relating to the family of the Hilliards. The case he had in
 mind is evidently *Hillyard* (sic) v. *Grantham* (4), in which he
 had been counsel and to which he refers in some detail in
Brownsword v. Edwards (5). In that case he said that at
 trial in the King's Bench on a question of legitimacy the
 sentence of a consistory court that the father and mother

(1) *Reporter's Note*. In *Boileau v. Rutlin* (1848) 2 Ex. at p. 677, Parke B. stated with reference to Buller's *Nisi Prius* that "the treatise was written by Lord Bathurst, though published in the name of Mr. Justice Buller."

(2) 12 Mod. 337; Holt, 133. This is the folio volume of "Cases determined by Sir John

"Holt, 1688-1710," published 1738. There are two other, and much later, series of "Holt's Reports," *Nisi prius*, published 1818 by F. L. Holt, and Equity cases, by William Holt, 1845.

(3) *Cases temp. Hardwicke*, 311.

(4) (Unrep.)

(5) (1751) 2 Ves. Sen. 245.

had lived in fornication was rejected, "first because it was a criminal matter and could not be given in evidence in a civil cause, and, secondly, because it was *res inter alios acta* and could not affect the issue." The importance of this is that it would seem that, when ruling on the evidence in *Gibson v. M'Carty* (1), Lord Hardwicke had in mind the doctrine that *res inter alios acta* could not be relevant to the issue. *Blakemore v. Glamorganshire Canal Co.* (2) shows that the earlier cases, while based on nice considerations as to competency of witnesses, might all have been decided on the ground that the evidence tendered was *res inter alios acta* and so inadmissible. The judgment in that case was delivered by Parke B., and is a clear authority against the admission of this class of evidence. So, too, is the passage in the opinion of Blackburn J., delivered to the House of Lords in *Castrique v. Imrie* (3), where he says, without any qualification, that "a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forgery in an action on the bill."

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Turning now to the cases on which Mr. Denning relies, in *Wilkinson v. Gordon* (4), Sir John Nicholl, dealing with the question whether the record of a conviction could be admitted to prove a bigamy, said: "I apprehend the true rule to be that a record of conviction is evidence of the same fact in a civil cause, only that it is not conclusive evidence," and for this he cited Gilbert on Evidence. This was a case in the Prerogative Court and decisions at Doctors' Commons were not binding on the courts at Westminster. The decision was given in 1824, and so was before the judgment of the Court of Exchequer in *Blakemore's* case (2). Moreover, the exact contrary was ruled in 1858 by Sir Cresswell Cresswell as judge ordinary, in *March v. March* (5), where, in giving leave to prove a divorce case based on bigamy by affidavit evidence, he said: "Remember that bigamy must be proved. Proof of the conviction of bigamy will not suffice." It may frequently happen that where bigamy or any other crime has to be proved in a civil proceeding, the prisoner on his trial had pleaded guilty. Proof of the confession by a witness present at the trial is admissible because an admission can

(1) Cas. temp. Hardwicke, 311. (4) 2 Addams, 152, 161.
(2) 2 C. M. & R. 133. (5) (1858) 28 L. J. (P. & M.) 30.
(3) (1870) L. R. 4 H. L. 414, 434.

C. A. always be given in evidence against the party who made it.
1943 In the present case, had the defendant before the magistrates

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"pleaded guilty or made some admission in giving evidence that would have supported the plaintiff's case, this could have been proved, but not the result of the trial.

It remains to deal with three more recent cases, all in the Probate, Divorce and Admiralty Division. The first is *In the Estate of Crippen* (1), where the administration of the estate of an intestate wife was sought, passing over the legal personal representative of her husband, who had been convicted of murdering her. Sir Samuel Evans P. admitted the conviction as proof that he had murdered her. The only point that was actually decided was that the fact that the husband was a convicted felon was a sufficient special circumstance to justify passing over his personal representative, and so far the decision is beyond criticism, but the President went on to consider the cases, some of which have already been cited in this judgment, and came to the conclusion that he could admit the conviction as prima facie proof that the husband had murdered his wife. The convenience of the decision is obvious, but we cannot agree that the authorities support it. It is difficult to understand how the learned President regarded the judgment of Bramwell L.J. in *Leyman v. Latimer* (2), which he quoted but apparently disregarded. That was a libel action, and the words complained of were that the plaintiff was a convicted felon, which was strictly true, but later in the libel he was called also a felon editor. To justify the last words, the lord justice said that the defendants must show that the plaintiff had actually committed felony, and then said: "It is plain from the numerous authorities cited "in Taylor on Evidence . . . that a conviction for felony is "res inter alios acta, and of itself is no evidence in any civil "proceeding that the person convicted has committed a felony." One would have thought this was a sufficiently clear ruling by a very high authority. Nor can we agree with the view that the President took of the passage in the opinion of Blackburn J. in *Castrique v. Imrie* (3), already cited. With all respect to the opinion of the learned President, we do not think that the authorities justified him in admitting the conviction as proof that the husband had murdered his wife. The next case is *Partington v. Partington and Atkinson* (4).

(1) [1911] P. 108.

(3) L. R. 4 H. L. 414, 434.

(2) (1878) 3 Ex. D. 352, 354.

(4) [1925] P. 34.

There a husband, who had previously been found to have been guilty as a co-respondent, petitioned for divorce. Counsel for the co-respondent in the husband's suit put in the decree in the former suit, apparently without objection, and the petitioner's counsel appear to have accepted that it was some evidence against him, though not an estoppel. The authorities we have been considering were not cited, and the matter seems to have been treated as a matter of practice. Horridge J. admitted the decree as some evidence, though not as an estoppel, and allowed the petitioner to give evidence denying the adultery which had been found against him in the previous suit. Then, in *O'Toole v. O'Toole* (1), Hill J. admitted proof of a conviction of the respondent of perjury in swearing that he had not had connexion with a certain woman as evidence that he had committed adultery with her. Hill J. obviously had considerable doubt on the matter, but thought *Par-tington's* case (2) justified him in admitting the evidence. In our opinion, these three cases go beyond and are contrary to the authorities and ought not to be followed in future.

There is one further observation we may make on this part of the case. The contention that a conviction or other judgment ought to be admitted as *prima facie* evidence is usually supported on the ground that the facts have been investigated and the result of the previous investigation is, therefore, at least some evidence of the facts that thereby have been established. To take the present case, it could be said that the conviction shows that the magistrates were satisfied on the facts before them that the defendant was guilty of negligent driving. If that be so, it ought to be open to a defendant who had been acquitted to prove it, as showing that the criminal court was not satisfied of his guilt, although the discussion by text-book writers and in the cases all turn on the admissibility of convictions and not of acquittals. If a conviction can be admitted, not as an estoppel, but as *prima facie* evidence, so ought an acquittal, and this only goes to show that the court trying the civil action can get no real guidance from the former proceedings without retrying the criminal case. Without dealing with every case and text-book that were cited in the argument, we are of opinion that, both on principle and authority, the conviction was rightly rejected.

Before parting with this question, we may add that in a

(1) (1926) 42 T. L. R. 245. (2) [1925] P. 34.

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C. A. note in the Law Quarterly Review, vol. xlii., p. 144, it is suggested that these three cases in the Probate Division can be supported by the application of the maxim "Omnia
1943 - "præsumuntur rite esse acta." The author of the note
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THORN & Co. would limit the admissibility as prima facie evidence of judgments which are res inter alios acta to those cases in which the State has an interest in seeing that the truth of the facts necessary to support the judgments is established, that is to say, convictions and decrees nisi, and this, he contends, is required as a matter of common sense. If such an exception is made, it ought to be by legislation and not by judicial decision. In any case, it is a very debatable point whether more weight ought to be given to a conviction or a decree nisi than to any other judgment. The King's Proctor does not, and cannot, investigate every case in which a decree nisi is granted. With the enormous increase in divorce cases that has taken place in the last twenty years, it would be impossible to inquire into more than a very small proportion, nor do we see that there is any more reason why the decision of a criminal court, whether a court of summary jurisdiction, quarter sessions or assizes, should be considered of greater evidential value than one given in a court exercising civil jurisdiction. If a conviction of murder is admissible, so must one be of a motoring or licensing offence, and to say that the State has an interest in summary convictions of this sort so as to attribute particular value to them as evidence, seems to us, with all respect, to be more theoretical than practical. In many, perhaps in most, cases the correctness of the conviction would not be questioned, but where it is, its value can be assessed only by a retrial on the same evidence. However convenient the other course may be, it is, in our opinion, safer in the interests of justice that on the subsequent trial the court should come to a decision on the facts placed before it without regard to the result of other proceedings before another tribunal.

The last point that arises is whether the statement made by the deceased to the police constable ought to have been admitted under the provisions of the Evidence Act, 1938. Hilbery J., without looking at the statement, refused to admit it, holding that the question of its admissibility was concluded by the judgment of this court in *Robinson v. Stern* (1). The question turns on s. 1, sub-s. 3, of the Act

which renders inadmissible a statement by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish. *Robinson v. Stern* (1) did not decide that a statement made to a constable who is inquiring into the facts of a road accident can never be admitted. It depends on whether the person making it is interested, as, no doubt, ordinarily the driver of a car involved in the accident would be, and also on whether proceedings are pending or anticipated. To enable the court to decide on the admissibility of the statement, the court is permitted, by s. 1, sub-s. 5, to look at it, and then draw any reasonable inference from its form and contents. That is what this court did in the case cited, and they drew the inference that the defendant in that case must have anticipated proceedings. We have looked at the statement that was tendered in evidence in the present case, and counsel have agreed that the warning required by s. 21 of the Road Traffic Act, 1930, was given to the deceased before he made it. In the circumstances of this case, we do not draw any inference from that fact. It was not the same sort of warning, nor were the circumstances in which it was given the same, as in *Robinson v. Stern* (1). Here we find from the statement that the defendant at first practically admitted that the accident was his fault, but some time afterwards came and said it was the fault of the deceased. In these circumstances we think that the deceased must have anticipated the likelihood at least of civil proceedings and, consequently, the statement was not admissible. The result is that the defendant's appeal succeeds; and there is no ground for sending the case back for a new trial. Judgment will be entered for the defendant with costs here and below.

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THORN & Co.

Appeal allowed.

Solicitor for defendants: *P. A. Gascoin.*

Solicitors for plaintiff: *Leader, Henderson & Leader.*

(1) [1939] 2 K. B. 260.

J. W. H.

1943

May 21.

WALKER v. HEMMANT.

Mine—Coal mine—Offence—Appeal—Quarter sessions—Fine amounting to less than half maximum—Coal Mines Act, 1911 (1 & 2 Geo. 5, c. 50), s. 104—Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 58), s. 37, sub-s. 1.

The appellant, who did not plead Guilty or admit the truth of the information, was convicted by a court of summary jurisdiction of an offence against the Coal Mines Act, 1911, and was ordered to pay a fine which did not amount to one-half the maximum fine for the offence, so that he could not appeal from the conviction to quarter sessions under s. 104 of that Act, but, *held*, that he had a right so to appeal under s. 37, sub-s. 1, of the Criminal Justice Administration Act, 1914, which extends the right of appeal granted by s. 104.

CASE stated by appeal committee of Glamorgan quarter sessions.

On June 3, 1942, the appellant, who pleaded "Not Guilty," was convicted by a court of summary jurisdiction at Aberdare, for that he, then being a collier at the Cwmneol Colliery, did unlawfully fail to observe such directions with respect to working as were given to him, contrary to s. 74 of the Coal Mines Act, 1911, and he was fined 10s., the maximum fine under s. 101, sub-s. 3, of the Act for that offence being 5*l*. He, therefore, had no right to appeal from the conviction to quarter sessions under s. 104 of the Act (1). He, however, appealed to quarter sessions, contending that, as he had not pleaded Guilty or admitted the truth of the information, his appeal lay thereto under s. 37, sub-s. 1, of the Criminal Justice Administration Act, 1914 (1). The appeal committee held that the appellant had no right of appeal to them because s. 37, sub-s. 1, of the Criminal Justice Administration Act, 1914, did not apply to summary convictions under the Coal Mines Act, 1911, and they dismissed the appeal, but stated this case.

(1) Coal Mines Act, 1911, s. 104:
 "If any person feels aggrieved by
 "any summary conviction under
 "this Act by which imprisonment
 "or a fine amounting to or
 "exceeding one half the maximum
 "fine, is adjudged, he may appeal
 "therefrom to quarter sessions."

Criminal Justice Administration
 Act, 1914, s. 37, sub-s. 1: "Any

"person aggrieved by any con-
 "viction of a court of summary
 "jurisdiction in respect of any
 "offence, who did not plead guilty
 "or admit the truth of the
 "information, may appeal from
 "the conviction in manner pro-
 "vided by the Summary Jurisdic-
 "tion Acts to a court of quarter
 "sessions."

Long K.C. and *Morris Morgan* for appellant. It is admitted that the appellant has no right of appeal under s. 104 of the Act of 1911, but he has that right under s. 37, sub-s. 1, of the Act of 1914. The rights of appeal granted by the two sections are not co-extensive, the right granted in 1914 being an extension of that granted in 1911. [They referred to the observations of the Earl of Reading C.J. in *Mittelmann v. Denman* (1).]

W. Matabele Davies for respondent. The wide and general words of s. 37, sub-s. 1, of the Criminal Justice Administration Act, 1914, leave the limitations on the right of appeal expressed by the special words of s. 104 unaffected. *Generalia specialibus non derogant*, as to which principle see the observations of Viscount Haldane L.C. in *Blackpool Corporation v. Starr Estate Co.* (2). A general later law does not abrogate an earlier special one by mere implication: Maxwell on the Interpretation of Statutes, 8th ed., p. 156, and the cases there cited.

Long K.C. replied.

VISCOUNT CALDECOTE C.J. The question raised by the special case is whether the appeal committee came to a correct conclusion when they held that a right of appeal to quarter sessions from a conviction by a court of summary jurisdiction of an offence under the Coal Mines Act, 1911, is limited to the right given by s. 104 of that Act. The appellant contends that it is not, and says that he has a right of appeal under the wide words of s. 37, sub-s. 1, of the Criminal Justice Administration Act, 1914. The respondent relies on the maxim *Generalia specialibus non derogant*, a principle which has been stated thus by Lord Haldane L.C. in *Blackpool Corporation v. Starr Estate Co.* (2): "It is that wherever Parliament in an earlier statute has directed its attention to an individual case and has made provision for it unambiguously, there arises a presumption that if in a subsequent statute the legislature lays down a general principle, that general principle is not to be taken as meant to rip up what the legislature had before provided for individually, unless an intention to do so is specially declared." Lord Selborne L.C. in *Seward v. "Vera Cruz"* put the principle a little differently when he said (3): "If anything be certain it is this, that

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(1) [1920] 1 K. B. 527.

(3) (1884) 10 App. Cas. 68.

(2) [1922] 1 A. C. 34.

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"where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words without any indication of a particular intention to do so." It seems to me, looking at the provisions of s. 37, sub-s. 1, of the Criminal Justice Administration Act, 1914, that the present is not a case where a later and general Act has derogated from earlier and special legislation, but that the later Act provides an extension of the right of appeal granted by the earlier statute. The right of appeal granted by s. 104 of the Act of 1911 was limited to those cases where imprisonment or a fine amounting to or exceeding one-half the maximum fine for the offence was adjudged, but the right was granted whether or not the defendant had pleaded Guilty. By s. 37, sub-s. 1, of the Act of 1914, a right of appeal was granted, in words which are very wide and general, to "any person aggrieved by any conviction of a court of summary jurisdiction in respect of any offence," the only condition being that he did not plead Guilty or admit the truth of the information. That limitation does not appear in s. 104 of the Act of 1911, and so the two enactments do not cover the same territory. In my opinion, to restrict the universality of the right of appeal granted by s. 37, sub-s. 1, of the Act of 1914 by reason of the provisions of s. 104 of the Act of 1911 would not be giving a reasonable interpretation to the words of the later statute with its thrice repeated emphasis on the word "any." The appeal committee, therefore, arrived at a wrong decision, and the case must go back to them that they may hear the appeal.

HUMPHREYS J. I agree, and I have nothing to add except that I think that this is a plain case.

ASQUITH J. I agree.

Appeal allowed.

Solicitors for appellant: *Smith, Rundell, Dods & Bockett, for Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for respondent: *Rosser, Davies & Hopkins, Pontypridd.*

C. G. M.

REX v. CARR-BRIANT.

C. C. A.

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Criminal law—Evidence—Burden of proof—Corruption—Gift to public servant—Offence “unless the contrary is proved”—Prevention of Corruption Act, 1916 (6 & 7 Geo. 5, c. 64), s. 2. Apr. 13, 15; May 25.

Where, either by statute or at common law, some matter is presumed against an accused person “unless the contrary is proved,” the jury should be directed that the burden of proof on the accused is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that this burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called on to establish.

APPEAL against conviction.

The appellant was charged at Shrewsbury Assizes with corruption, contrary to the Prevention of Corruption Act, 1906, and was sentenced to eighteen months' imprisonment. The appellant was a director of a firm which on August 23, 1940, entered into a contract for work to be done with the War Department. Payments in respect of work done under the contracts were made on the certificate of an engineer named Baldock, an employee of the War Department, that it had been satisfactorily performed. On September 5, 1940, the appellant gave or lent to Baldock a sum of 60*l.*, so that Baldock might pay for a motor-car which he had agreed to buy. At the trial Charles J. directed the jury that the appellant had not only to discharge the burden of proof and show that he gave the money without a corrupt motive, but had also to do so beyond all reasonable doubt, and, if the jury were left in doubt by the evidence given on behalf of the appellant, they must convict him. The appellant appealed (inter alia) on the ground that Charles J. misdirected the jury as to the extent of the burden of proof placed on an accused person by s. 2 of the Prevention of Corruption Act, 1916 (1).

(1) By s. 2 of the Prevention of Corruption Act, 1916: “Where in any proceedings against a person for an offence under the Prevention of Corruption Act, 1906 . . . it is proved that any money, gift, or other consideration has been paid or given to or received by a person in the employment of His Majesty or any government department or a public body by or from a person, or agent of a person, holding or seeking to obtain a contract from His Majesty or any government department or public body, the money, gift, or consideration shall be deemed

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Cartwright Sharp K.C., Beresford and Lachs for the appellant. The words in s. 2 of the Prevention of Corruption Act, 1916, "unless the contrary is proved," impose on the accused person only the same burden as that which is cast on a plaintiff in a civil action, where, as Willes J. said in *Cooper v. Slade* (1), "the preponderance of probability may constitute sufficient "ground for a verdict." The burden of proof on the accused is less than that on the prosecution of proving a case beyond reasonable doubt : see Best on Evidence, 12th ed., p. 82, s. 95, and the observations of Pigot C.B. in *Magee v. Mark* (2). Viscount Hailsham L.C. said, in delivering the judgment of the Privy Council in *Sodeman v. Regem* (3), that the burden in criminal cases in which an accused has to prove insanity may fairly be stated as not being higher than the burden which rests on a plaintiff or defendant in civil proceedings. In *Cant v. Alexander Harley & Sons, Ltd.* (4) du Parc J., in dealing with the words in s. 116 of the Public Health Act, 1875 : "The proof that the same"—animal, carcase, meat, poultry, game, etc.—"was not exposed or deposited for any "such purpose, or was not intended for the food of man, "resting with the party charged," said (5) : "There is no "authority for saying that, in so far as the burden of proof "beyond reasonable doubt is heavier than the burden of "proof without those qualifying words, the heavier burden "rests upon a defendant in such a case as this." Charles J. was in error in directing the jury as he did, and the conviction should be quashed.

Bourke for the Crown. The direction of Charles J. was correct : *Rex v. Evans-Jones and Jenkins* (6).

Cur. adv. vult.

1943. May 25. HUMPHREYS J. read the judgment of the court (VISCOUNT CALDECOTE C.J., HUMPHREYS and LEWIS JJ.)

"to have been paid or given and
"received corruptly as [an induce-
"ment or reward for doing or
"forbearing to do an act in
"relation to the affairs or business
"of that person's principal, or
"showing or forbearing to show
"favour or disfavour in relation
"to his principal's affairs or
"business] unless the contrary is

"proved."

(1) (1858) 6 H. L. Cas. 746,
772.

(2) (1861) 11 Ir. C. L. R. 449,
468.

(3) [1936] W. N. 190, 191.

(4) [1938] 2 All E. R. 768.

(5) Ibid. 773.

(6) (1923) 17 Cr. App. Rep. 121.

in which he dealt with the other grounds of appeal on which the conviction was quashed, but which are immaterial to this report, and continued: Another ground relied on for the appellant is that Charles J. misdirected the jury as to the extent of the burden of proof placed on an accused person by s. 2 of the Prevention of Corruption Act, 1916.

In support of the proposition laid down by Charles J., that the burden of proof resting on the appellant to negative corruption was as heavy as that resting in a normal case on the prosecution, counsel for the Crown relied on *Rex v. Evans-Jones and Jenkins* (1), a case under the Prevention of Corruption Acts, 1906 and 1916, in which the court upheld a direction to the effect that, if, after hearing the defence, the jury had any doubt, they must find the accused person guilty. In the report such expressions as "the defendants must show" "that the payments were not corrupt," "if they had any" "doubt on that they must convict" and "the explanation" "required is an explanation which satisfies the jury," were treated as interchangeable. The question whether the onus on the accused under the section was the same as that resting in the first place on the prosecution was not discussed. Moreover, Shearman J. appears to liken the onus placed on an accused by s. 2 of the Act of 1916 to that in a defence of insanity. There can, however, be no doubt that the onus on the accused in a defence of insanity is far different from that normally resting on the prosecution. In the course of the argument in that case reference was made to *Rex v. Ward* (2). The court considered it as throwing no light on the case under discussion. In our view, however, that case is by no means unimportant, having regard to the principle contended for in the present case. The appellant had been convicted of the offence created by s. 58 of the Larceny Act, 1861 (now s. 28 of the Larceny Act, 1916), of having been found by night in possession of implements of housebreaking "without" "lawful excuse (the proof of which excuse shall lie on such" "person)." The implements were such as would form part of the outfit of a bricklayer and the appellant was a bricklayer by trade. The court quashed the conviction on the ground of misdirection, the trial judge having told the jury that the appellant had to satisfy the jury that he was rightly in possession of the tools at the time and had no unlawful intention. Lord Reading C.J., in giving the judgment of the court,

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(2) [1915] 3 K. B. 696.

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observed (1): "It was for the appellant to satisfy the jury that, in the words of s. 58, he had a 'lawful excuse' It was stated by the appellant in his evidence and not disputed by the prosecution that he was a bricklayer. That being so, and the tools being admittedly bricklayers' tools, the appellant had established prima facie that he had a lawful excuse for being in the possession of the tools, and the onus was shifted on to the prosecution to prove to the satisfaction of the jury, if they could, from the other circumstances of the case that the appellant was not in the possession of the tools for an innocent purpose but for the purpose of housebreaking."

That authority is, in our opinion, inconsistent with the notion that words throwing the onus of proof of certain matters on the accused involve placing the accused in the same position as the prosecution in a normal case so as to require of him that he should prove his case beyond any reasonable doubt. Moreover, it seems to us to be in accord with the principle of our law expressed in the well-known passage in the speech of Viscount Sankey L.C. in *Woolmington v. Director of Public Prosecutions* (2): "No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained." We see no reason why the rebuttable presumption created by the section should not be construed in the same manner as similar words in other statutes or similar presumptions at common law, for instance, the presumption of sanity in the case of an accused person who is setting up the defence of insanity. We agree with and adopt for the purpose of this judgment the language of Lord Hailsham L.C., in delivering the judgment of the Privy Council in *Sodeman v. Regem* (3), where he said: "The suggestion made by the petitioner was that the jury may have been misled by the judge's language into the impression that the burden of proof resting upon the accused to prove the insanity was as heavy as the burden of proof resting upon the prosecution to prove the facts which they had to establish. In fact there was no doubt that the burden of proof for the defence was not so onerous It was certainly plain that the burden in cases in which an accused had to prove insanity might fairly be stated as not being higher than the burden which

(1) [1915] 3 K. B. 696, 697.

(3) [1936] W. N. 190, 191.

(2) [1935] A. C. 462, 481.

"rested upon a plaintiff or defendant in civil proceedings. "That that was the law was not challenged." In so holding the Lord Chancellor was in agreement with the decision of the majority of the Supreme Court of Canada in *Clark v. The King* (1), where Duff J., in the course of his judgment, expressed the view that the necessity for excluding doubt contained in the rule as to the onus on the prosecution in criminal cases might be regarded as an exception founded on considerations of public policy. There can be no consideration of public policy calling for similar stringency in the case of an accused person endeavouring to displace a rebuttable presumption.

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Sodeman v. Regem (2) has been considered by the Irish Court of Criminal Appeal in *The People v. Fennell* (3). The judgment of the court, delivered by Sullivan C.J., does not purport to differ from the conclusion arrived at by the Privy Council. Indeed, the reference to the decision in *Sodeman's* case concludes with the words: "That seems a sound test to "apply " (4). The judgment, however, in *Fennell's* case, as reported, so far as it relates to *Sodeman's* case, is so inaccurate as to be misleading. It contains the following sentence (4): "The trial judge in that case (which was from Australia) had "directed the jury 'that the burden of proof of insanity that "'lay upon the prisoner was as strict and onerous as the "'burden of proof that lay on the Crown with regard to the "'facts which the prosecution had to establish.'" In point of fact, the trial judge had given no such direction. What the Chief Justice is purporting to quote as the direction of the trial judge was merely the argument of counsel for the appellant as to the effect of that direction, an argument not accepted by the Privy Council. *Fennell's* case cannot, we think, be regarded as any authority on this point.

What is the burden resting on a plaintiff or defendant in civil proceedings can, we think, best be stated in the words of the classic pronouncement on the subject by Willes J. in *Cooper v. Slade* (5). That learned judge referred to an ancient authority in support of what he termed "the elementary "proposition that in civil cases the preponderance of probability "may constitute sufficient ground for a verdict." The authority in question was the judgment of Dyer C.J. and a

(1) (1921) 61 S. C. R. (Can.)
608, 617.

(3) [1940] I. R. 445.

(4) Ibid. 450.

(2) [1936] W. N. 190.

(5) 6 H. L. Cas. 772.

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majority of the justices of the Common Pleas in *Newis v. Lark* (1), decided in the reign of Queen Elizabeth. The report contains this passage (2): "Where the matter is so far gone that the parties are at issue . . . so that the jury is "to give a verdict one way or other, there, if the matter is "doubtful, they may found their verdict upon that which "appears the most probable and by the same reason that which "is most probable shall be good evidence."

In our judgment, in any case where, either by statute or at common law, some matter is presumed against an accused person "unless the contrary is proved," the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish.

Appeal allowed.

Solicitors for appellant: *J. C. H. Bowdler & Sons, Shrewsbury.*

Solicitor for the Crown: *B. D. J. Hayes, Shrewsbury.*

(1) (1571) Plowd. 403.

(2) Ibid. 412.

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INGRAM *v.* UNITED AUTOMOBILE SERVICE, LIMITED,
AND OTHERS.

May 18, 19.

Negligence—Joint tortfeasors—Apportionment of damages and costs—Revision by Court of Appeal.

Where an appellate tribunal accepts the finding of fact of the court below that two defendants in an action for negligence were both to blame, it should, in the absence of error in law, only in very exceptional circumstances revise the apportionment of blame made by the trial judge.

The Macgregor [1943] A. C. 197 applied.

APPEAL from Hallett J.

The plaintiff, who was a passenger in an omnibus belonging to the first defendants, brought an action against them and

also against the second defendants, who were the owners of a lorry, to recover damages for personal injuries received by her owing, she alleged, to the negligence of the servants of both the defendants. Hallett J. held that both defendants were liable and gave judgment against them for 280*l.* 10*s.* 4*d.* damages and costs, directing that the first defendants should pay one-third, and the second defendants two-thirds, of the amount of the damages and costs. The first defendants appealed on the question of liability, and the second defendants on the question of liability and also against the order directing them to pay two-thirds of the damages and costs.

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Humfrey Edmunds for the first defendants.

Beyfus K.C. and *J. Charlesworth* for the second defendants.

Eddedale for the plaintiff.

· MACKINNON L.J. (after stating the facts and expressing his agreement with the view that both the defendants were liable). A second question is raised on the appeal as to the proportion of the damages and costs to be borne by each defendant. Mr. Beyfus, for the owners of the lorry, contended that the apportionment made by the judge should have been more favourable to his clients. That submission raises a point of some difficulty as to the extent to which it is open to this court to review the apportionment of liability made by the judge. A similar question recently arose in *The Testbank* (1) in connexion with the apportionment of the blame in the case of a collision between two ships, which is the function of the judge under the Maritime Conventions Act, 1911, s. 1. In the earlier case of *The Karamea* (2) it was said by the members of the Court of Appeal that, save in exceptional cases, it would be undesirable for that court to vary the degrees of blame which the judge in the Admiralty Court had apportioned when he found that both ships were to blame for a collision. In *The Testbank* (1) the Court of Appeal, of which I was a member, took the view that the statements in the earlier case were only dicta, and expressed the opinion that, on principle, there was no reason why the decision by the judge in making the apportionment should not be open to review in the same way as any other finding of fact by a trial judge. In *The Macgregor* (3) the House of Lords said that the view which

(1) [1942] P. 75.

(3) [1943] A. C. 197, 199.

(2) [1921] P. 76.

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we had expressed in *The Testbank* (1) was wrong, and that, if the Court of Appeal agreed with the finding of the judge in the Admiralty Court as to the liability of both vessels, it ought not to interfere with the apportionment of liability made by the judge. Viscount Simon L.C. said: "When findings of fact are not disputed and the conclusion that both vessels are to blame stands, the cases in which an appellate tribunal will undertake to revise the distribution of blame will be rare." In *The Testbank* (1) we had in this court expressly called attention to the fact that a similar question might arise in connexion with the apportionment of liability between two defendants under s. 6, sub-s. 2, of the Law Reform (Married Women and Tortfeasors) Act, 1935, and I venture to think that it would have been kinder, at any rate, to members of this court if the House of Lords had intimated for our guidance what the position under the Act of 1935 should be and whether the same rule is to be followed as that applicable in the case of ships under the Act of 1911. Not one of their Lordships, however, condescended to say a single word about the problem to which we had expressly referred. For my part, I cannot see why there should be any difference between the case of the apportionment of liability as between the owners of two ships in a collision at sea and that between two tortfeasors in a road collision. In the present case I am of opinion that the conclusion that both defendants were liable should stand, and, therefore, applying the rule laid down by the Lord Chancellor, I hold that we ought not to interfere with the apportionment of blame made by the judge. I am not at all sure that I should not have agreed with the judge if I were free to examine the question, which, in my opinion, I am not. The result is that the appeals will be dismissed.

DU PARCQ L.J. I agree. It would seem to follow from the decision of the House of Lords in *The Macgregor* (2) that this court should not interfere with the apportionment of liability made by the judge at the trial unless there is some error of law or of fact in his judgment. I come to that conclusion particularly in view of the observations of Lord Wright in that case (3). In the present case the matter is perhaps one of academic interest because I should not have been prepared to differ from the judge in the apportionment that he has

(1) [1942] P. 75.

(3) Ibid. 201.

(2) [1943] A. C. 197.

made, although, if I had tried the case, I should not necessarily have apportioned the damages in exactly the same way. This court has never taken the view that it should alter an apportionment unless there was something seriously wrong with it. In the present case I do not think there was, and, therefore, I should not be prepared to interfere. I agree that the appeals should be dismissed.

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UTHWATT J. I agree.

Appeals dismissed.

Solicitors for first defendants: *Stanley & Co., for John H. Sinton & Co., Newcastle-upon-Tyne.*

Solicitors for second defendants: *Isadore Goldman & Son, for R. R. Crute & Son, Newcastle-upon-Tyne.*

Solicitor for plaintiff: *Eric G. Floyd.*

P. B. D.

Dictum of MACNAGHTEN, J., at pp. 616, 617, approved. GALASHIELS GAS CO., LTD. v. MILLAR. [1949] 1 All E.R. 319.

COLE v. BLACKSTONE AND COMPANY, LIMITED.

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July 2, 8,
19.

Factory Acts—Ladder—Duty to maintain in efficient state and good repair—Scope of obligation—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 67), s. 25, sub-s. 4; s. 152, sub-s. 1.

The obligation imposed by s. 25, sub-s. 4, of the Factories Act, 1937, that "all ladders shall be soundly constructed and properly "maintained" is absolute and cannot be discharged by the occupier of a factory taking all practical steps to see that a ladder is in an efficient state and good repair.

ACTION tried by Macnaghten J. at Nottingham Assizes.

The plaintiff, Mrs. Kate Cole, the widow of John William Cole, a crane-man employed by the defendants, Blackstone & Co., Ltd., claimed damages for the death of her husband. In the course of his employment Cole met with an accident which caused his death. To reach the driving cab of his crane he had to use a ladder some twenty feet high. On the morning of November 20, 1941, he was found on the floor at the foot of the ladder, and close beside him was lying one of the rungs. It was obvious that this rung had given way while he was ascending the ladder, with the result that he fell to the ground and suffered the injuries from which he died. The ladder was subsequently taken to pieces and examined. The strings were made of deal and the rungs of

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coppice oak, and both the strings and all the rungs, including that which had given way, were found to be in perfect condition. The rungs were screwed to the strings with three-inch steel screws, and it was found that those which had held the rung which had given way had broken in half at a point between the rung and the string and that the fractures were due to corrosion. All the other screws were in perfect condition. A few weeks before the accident happened the ladder had been inspected by a "safety first" committee appointed by the defendants, to which the workmen elected their own representatives, and nothing had been found requiring attention. Cole, who used the ladder several times a day, had never made any complaint about it. In her statement of claim, the plaintiff alleged negligence at common law only. By amendment, a claim was added for an alleged breach of the statutory obligation imposed by s. 25, sub-s. 4, and s. 152, sub-s. 1, of the Factories Act, 1937 (1).

Loseby (G. H. Dixon with him) for the plaintiff.

Elizabeth Kathleen Lane (A. P. Marshall with her) for the defendants.

Cur. adv. vult.

July 19. MACNAGHTEN J. stated the facts, and continued: The plaintiff's counsel, without abandoning his original ground of claim, relied on the alleged breach of the statutory duty imposed by the Factories Act, 1937, and argued, first, that the ladder in question had not been properly constructed, and, secondly, that it had not been maintained in an efficient state or in good repair. In support of his first submission he could only rely on the fact that the screws had suffered corrosion, and he submitted that the fact that after the accident the defendants had substituted carriage bolts for screws to attach the rungs to the strings, was evidence that "the construction" of the ladder was not sound. I find myself unable to take that view of the matter. The screws were long enough and strong enough to maintain the rungs in position; their failure to do so was due to corrosion. On the question whether the ladder was in an "efficient

(1) Factories Act, 1937, s. 25, sub-s. 4: "All ladders shall be soundly constructed and properly maintained."

Sect. 152, sub-s. 1: "Maintained" means maintained in an efficient state, in efficient working order, and in good repair."

"state" and in "good repair" on the morning of the accident, the fact that the rung gave way establishes, to my mind, beyond question, that the ladder was not in an efficient state and was not in good repair at that time. Mr. Marshall, for the defendants, submitted that the statutory duty to keep the ladder in an efficient state and in good repair is not an absolute duty, and that the words of the Act must be qualified to this extent that, if the employer took all reasonable steps to see that the ladder was in an efficient state and in good repair, he would have discharged his duty. In support of this contention he relied on the observations of Lord Wright in *Wilsons & Clyde Coal Co. v. English* (1), while Mr. Dixon, on the other hand, relied on the observations made in *Potts (or Riddell) v. Reid* (2). I see no ground for qualifying the words of s. 25, sub-s. 4, of the Factories Act, 1937. The duty to keep all ladders in an efficient state and in good repair appears to me to be as absolute as the duty imposed by the Act to fence all dangerous parts of machinery. It is true that the defendants took great care for the safety of their men, and that this particular failure was one which, apparently, nobody could have anticipated. The fact that none of the other screws in the ladder were affected with corrosion indicates that there must have been something exceptional about this particular rung to bring about the deplorable result that it gave way. It was suggested that the rung must have worked slightly loose and that sulphur fumes from the adjacent factory must have caused the corrosion: but neither the "safety first" committee nor Cole observed that there was anything amiss with the rung, or if they did observe that the rung was at all loose, they did not think it material. However that may be, the ladder was not in fact in an efficient state or in good repair on the morning of the accident. The plaintiff, therefore, is entitled to recover compensation, which I assess at 700*l.*, and also 43*l.* 8*s.* 6*d.*, the agreed amount of the funeral expenses.

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Judgment for plaintiff.

Solicitors for plaintiff: *Ernest H. Godson & Co., Sleaford.*

Solicitors for defendants: *Stafford Clark & Co., for Ironside & Co., Leicester.*

(1) [1938] A. C. 56, 78. (2) [1943] A. C. 1.

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GRIFFITHS v. DAVIES.

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July 2.

Landlord and tenant—Rent restriction—Standard rent—Application to determine—Existing rent not disputed in previous proceedings—Estoppel—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 1—Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 Geo. 5, c. 32), s. 11, sub-s. 1.

In an action by the landlord of a dwelling-house to which the Rent Restrictions Acts applied, in which he claimed possession for non-payment of rent, the tenant did not take the point that the rent was in excess of the standard rent plus the permitted increases and judgment was given for possession, but suspended so long as the current rent and 2s. 6d. a month off the arrears was paid. The tenant paid the current rent and instalments of the arrears, but later he applied to the county court under s. 11, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923, to determine the standard rent and the current lawful rent :—

Held, that the tenant was not estopped from pursuing his application by the judgment in the possession action, since the doctrine of estoppel by judgment did not apply where the result would be to compel the court to give a judgment which it was by statute prohibited from giving, namely, in the present case, to determine the standard rent otherwise than in accordance with the provisions of the Rent Restrictions Acts.

APPEAL from Llanely county court.

From 1915 to 1919 a dwelling-house known as 3 Gwynfryn Terrace, Cynheidre, Llanely, was let at a rent of 11l. a year. From 1919 the present tenant, Mrs. Margaret Griffiths, occupied the dwelling-house at a yearly rent of 26l. In 1933, the rent being in arrear, the landlord, Mrs. Margaret Davies, brought an action against the tenant in the county court claiming possession and arrears of rent. In that action the point was not taken by the tenant that the rent of 26l. was in excess of the standard or permitted rent, and judgment was given for possession but was suspended so long as the current rent, together with 2s. 6d. a month off the arrears, was paid. The tenant duly paid the rent and instalments under the judgment until 1942 when she applied to the county court under s. 11, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923, to fix the standard rent and the current lawful rent of the dwelling-house. The landlord objected that the tenant was estopped from maintaining her application by the judgment in the possession action in which she could have raised the question of the standard rent, but did not do so, and the

county court judge refused to entertain her application. The tenant appealed.

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H. Samuels for the tenant. There is no estoppel. The doctrine of estoppel by judgment cannot apply if the result would be to make the court give a judgment in the later proceedings which is contrary to a statutory provision. Here, s. 1 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (1), renders any rent in excess of that permitted by the Act irrecoverable, and the court cannot be put by any estoppel in the position of sanctioning such an irrecoverable rent: see *Bradshaw v. M'Mullan* (2), *Maritime Electric Co., Ltd. v. General Dairies, Ltd.* (3), and, as to excusable ignorance of the point, *Spencer Bower on Res Judicata*, p. 112.

S. R. Benson for the landlord. Even assuming that the proposition is generally true that estoppel is not available in face of a statutory prohibition, here the statute was passed for the benefit of the tenant. She failed to avail herself of it when she might have done so and she should not be allowed to do so now. Moreover, the tenant is at present in possession, not by virtue of the Acts, but by virtue of the suspension of the judgment for possession so long as she makes the payments specified in the judgment, and she is, at any rate, estopped from saying that she is not liable for the payment for which judgment has been given against her.

LORD GREENE M.R. It is said that, having regard to the language of the Rent Restrictions Acts, the judgment in the proceedings in 1933, which might, in cases not governed by

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 1: "Subject to the provisions of this Act, where the rent of any dwelling-house to which this Act applies . . . has been, since March 25, 1920, or is hereafter, increased, then, if the increased rent . . . exceeds by more than the amount permitted under this Act the standard rent . . . the amount of such excess shall, notwithstanding any agreement to the contrary, be irrecoverable from the tenant."

Rent and Mortgage Interest Restrictions Act, 1923, s. 11, sub-s. 1: "The county court shall have power on the application of a landlord or a tenant to determine summarily any questions as to the amount of the rent, standard rent or net rent of any dwelling-house to which the principal Act applies, or as to the increase of rent permitted under that Act or this Part of this Act."

(2) [1920] 2 I. R. 412.

(3) [1937] A. C. 610.

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those Acts, have precluded the tenant from alleging now that the rent was other than 26*l.*, do not prevent her from doing so. It is argued that the principles of estoppel or of *res judicata* do not apply where to give effect to them would be to go counter to some statutory direction or prohibition, and that s. 1 of the Act of 1920 is a statutory direction to the court to abstain from giving a judgment for recovery of rent which is shown to the court to be excessive.

It appears to me beyond all question that, if, in proceedings where the point is not taken, judgment for an amount of conventional rent which is excessive is given against a tenant, and, later, an action is brought against the tenant for the conventional rent at the same rate, in which later proceedings it is shown that that rent is excessive, the earlier judgment cannot give to the court a jurisdiction which s. 1 of the Act of 1920 has denied to it. In other words, if two actions are brought in respect of two different rent periods, and in the first action judgment is given for the conventional rent and in the second it is shown that the conventional rent is too high, the court is bound in the second action to give effect to the provisions of s. 1 and to refuse to give judgment for the recovery of the excess rent. Otherwise the court would be doing something which the statute says it is not to do.

Sect. 11 of the Act of 1923 merely provides convenient machinery for deciding questions as to (*inter alia*) the amount of the standard rent. It is an ancillary jurisdiction to enable the court to decide, without reference to any existing claim for rent or for possession, the question what is the rent which, having regard to the terms of the Acts, is legally exigible from the tenant. It is ancillary in the sense that a tenant who has obtained an order under that section can, in any subsequent proceedings use that order to establish the standard rent on which he relies. Is it to be said that, because in previous proceedings the point about excess rent was not taken, the tenant is for ever thereafter precluded from invoking that ancillary machinery, the whole object of which is to enable the question propounded by s. 1 of the Act of 1920—namely, Is the rent excessive?—to be answered? In my opinion, the fact that the application is one under s. 11 of the Act of 1923 leaves the matter in precisely the same position so far as *res judicata* or estoppel is concerned as if the point had been taken as a substantive defence in a subsequent action for rent. Notwithstanding the judgment in 1933, it is equally competent

to the tenant to make an application under s. 11 of the Act of 1923 to determine the lawful rent or to resist a claim for rent under s. 1 of the Act of 1920.

I do not think I need refer at length to authority for the proposition that a statutory prohibition or direction cannot be overridden or defeated by a previous judgment between the parties. If authority for that proposition were required, it is to be found in Lord Shaw's speech in the House of Lords in *Bradshaw v. M'Mullan* (1), a statement of the law which is again referred to in the judgment of the Privy Council in *Maritime Electric Co., Ltd. v. General Dairies, Ltd.* (2). It is a principle which manifestly is right, quite apart from authority.

A further point is taken on behalf of the landlord, namely, that the tenant has enjoyed the benefit of the suspension of the judgment for possession in 1933 on the terms laid down by the court that the current rent is to be paid. By "current rent," I apprehend, is meant, not merely the rent current at the date of the judgment, but the current rent as it accrued. We are told that the tenant has continued to pay the rent at the conventional rate of 26*l.*, and has also paid the instalments of 2*s.* 6*d.* a month off the arrears. It is said that, as the terms were that the current rent should be paid as a condition of the judgment being suspended, she is not entitled now to take the benefit of that suspension and in effect repudiate one of the terms on which it was granted. In my opinion, that point will not bear examination, because the phrase "current rent" in the judgment must mean "current rent, whatever by law that rent should be." The conventional rent was 26*l.* If that was excessive and the true rent was, say, 20*l.*, then the condition on which the judgment for possession was suspended is and can only be a condition of paying rent at the rate of 20*l.* The court would have had no jurisdiction to impose a condition for payment of rent at more than the permissible rate. On the true construction of the language of the judgment, the words "current rent" must mean whatever rent is legally exigible under the contract as modified, if modified at all, by the terms of the Rent Restriction Acts.

The last point taken was that under s. 11 the county court has a discretion whether or not it will entertain an application to decide a question relating to standard rent. I express no opinion whether in some cases the court might be justified in saying that the matter could not appropriately or conveniently

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(1) [1920] 2 I. R. 412, 425.

(2) [1937] A. C. 610, 622.

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be decided by such a proceeding, but, assuming that in a suitable case the court could exercise that jurisdiction, I am clear that it must exercise a judicial discretion and could only refuse to entertain the application on proper grounds. In my opinion, the ground on which the county court judge in this case refused to entertain the application was ill-founded in law, and, therefore, it cannot be said that the discretion, if there be one under s. 11, has been properly exercised. In the result, the appeal must be allowed, and the matter must go back to the county court to hear and deal with the application.

MACKINNON L.J. I agree. I think that the judge was wrong in declining to entertain this application. That is the only thing we are deciding. If, on the application being heard in the county court, it should be found that the standard rent was less than 10s. a week, this decision must not be taken as indicating what should happen if the tenant were to seek to get behind the judgment of 1933 and say that the 10s. a week and arrears there provided for must be reduced. That question is not before us. Very different considerations might apply to it, and on it I express no opinion, even by implication.

DU PARCQ L.J. I agree with the judgment of the Master of the Rolls and also with what MacKinnon L.J. has said and I would wish expressly to reserve my opinion on the matter which he has suggested may hereafter arise. On the main question, I think that the matter on principle and authority is reasonably plain. These Acts of Parliament were passed in the general interests of the public. The standard rent is a sum which it is possible to fix by a calculation made in accordance with the Acts, and that standard rent cannot be altered by any admission or omission on the part of the tenant. The Acts penalize a landlord who takes more than the standard rent to the extent that the tenant can recover from him the amount of any overpayment and, further, a landlord who tries to get more than the standard rent by means of fines or premiums is guilty of an offence for which he can be prosecuted. I might also refer to s. 11 of the Act of 1920 by which the landlord is bound, if asked, to state what the standard rent is, again under penalties if he fails to do so without reasonable excuse. The whole scheme of the

Act is to prevent a tenant from coming to any agreement or doing anything else which will have the effect of increasing the standard rent. In those circumstances, the words of Lord Shaw in *Bradshaw v. M'Mullan* (1), to which we were referred, are particularly apposite to this case, and I agree that the appeal must be allowed.

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LORD GREENE M.R. I should add that I entirely agree with the observations of my brother MacKinnon. Nothing I have said can be construed as prejudging any position which may hereafter arise as a result of any order that the tenant may obtain when her application under s. 11 of the Act of 1923 has been dealt with.

Appeal allowed.

Solicitors for tenant : *Bircham & Co.*

Solicitors for landlord : *Rhys Roberts & Co., for Mervyn D. J. Paton, Llanelly.*

(1) [1920] 2 I. R. 412, 425.

J. W. H.

Applied. HARRIS v. ROWLEY. [1949] All E.R. 524.

Followed. HARRIS v.
ROWLEY.
[1949] 2 K. B. 697

PICKFORD v. MACE.

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July 13, 14.

Landlord and tenant—Rent restriction—Possession—Agricultural worker—Dwelling-house required for his occupation—"Work necessary for proper working of holding"—Evidence—Certificate of War Agricultural Executive Committee—Worker and work not identified—Sufficiency—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 Geo. 5, c. 32), sch. I., para. (g) (ii.).

A War Agricultural Executive Committee issued a certificate in the form : "The committee hereby certify that the agricultural "worker for whose occupation the cottage or dwelling-house "now occupied by Miss F. M. and known as M. farmhouse is "required by Messrs. T. P. & Son, the landlord, is to be employed "on work necessary for the proper working of the agricultural "holding known as Y.T. and M. farms" :—

Held, that, although the certificate did not name or otherwise identify the agricultural worker in question, it was sufficient to entitle the landlord to an order under para. (g) (ii.) of sch. I. of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, for possession of M. farmhouse on proof that he had entered into a contract, or a conditional contract subject to housing accommodation being provided, with an agricultural worker.

Per curiam : It is desirable, though not essential, that the kind of worker to whom the certificate relates should be specified in the certificate.

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APPEAL from Witney county court.

The plaintiffs, T. R. Pickford & Son, farmed in partnership as one agricultural holding Yew Tree farm and Malthouse farm, Standlake, Oxon. In 1935 they let Malthouse farmhouse on a quarterly tenancy to the defendant, Miss Mace, at a yearly rent of 32*l*. In 1941 the plaintiffs desired to employ a foreman, and required Malthouse farmhouse as a residence for him and his family. They gave the defendant notice to quit at Michaelmas, 1941, but she continued in possession, and on March 9, 1943, the plaintiffs obtained from the Oxfordshire War Agricultural Executive Committee a certificate in the following form: "The Oxfordshire War Agricultural Executive Committee hereby certify that the agricultural worker for whose occupation the cottage or dwelling-house now occupied by Miss Florence Mace and known as Malthouse farmhouse is required by Messrs. T. Pickford & Son, the landlord, is to be employed on work necessary for the proper working of the agricultural holding known as Yew Tree and Malthouse farms, Standlake, Oxon." A note was appended to the certificate: "This certificate is granted on the understanding that the Court of Appeal in the case of *Knight v. Winter* (1), April 24, 1942, ruled that it was not necessary for the name of the person for whose occupation the cottage is required to be inserted in the certificate." At the date of the certificate the plaintiffs had not entered into a contract, or a conditional contract subject to housing accommodation being available, with any person to be employed as foreman, but they shortly afterwards engaged one Perrett, who thereafter lived in a boarding house apart from his wife and family till possession of the Malthouse farmhouse could be obtained. There was no other suitable accommodation on the estate. The plaintiffs applied to the county court for possession under para. (g) (ii.) of sch. I. to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (2). The county court judge refused the application, being of

(1) Unrep.

(2) Sch. I. to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, lays down the conditions under which alternative accommodation is not necessary to the making of an order for possession under s. 3, sub-s. 1 (a), of the Act. By

para. (g) one of those conditions is that "the dwelling-house is reasonably required by the landlord for occupation as a residence for some person engaged in his whole-time employment . . . or with whom, conditional on housing accommodation being provided, a contract for such

opinion that the plaintiffs were bound to show that the certificate was issued in respect of some actual or prospective employee for whom they required the premises, and who, though he need not necessarily be named, must be identifiable as the person on whose behalf they were demanding possession. He held that the certificate merely relieved the plaintiffs of the onus of proving that the work on which the employee was to be employed was necessary for the proper working of the holding, and that the plaintiffs had failed to prove a conditional contract with a person in respect of whom the court could be satisfied, under para. (g) (ii.) of the schedule, that he was to be employed on that work. The county court judge did not deal with the question whether it was reasonable to make an order for possession. The plaintiffs appealed.

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Denning K.C. and *Safford* for the plaintiffs. The War Agricultural Executive Committee can grant a certificate that premises are required for occupation by an agricultural worker before a worker has been secured: *Smith v. Primavesi* (1), in which the judge was held bound to accept the certificate, was a decision under the original wording of s. 5, sub-s. 1 (d) (iii.), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. Both under that section and under the amending provision of s. 4 of the Act of 1923, the certificate had to certify that the premises were required for "a person" engaged on work necessary for the working of an agricultural holding. Under those provisions it might well have seemed that the certificate must refer to a specified person, but in *Kemp v. Ballachulish Estate Co.* (2) it was held that the name of the worker need not appear in the certificate. By the Act of 1933 the position was altered. All that the committee now has to do is to be satisfied, without reference to any specific worker, that the agricultural holding is in need of an agricultural worker of a particular kind, and it is for the court to satisfy itself that such a worker has been, or will be, employed, before making an order for possession.

"employment has been entered
"into, and . . . (ii.) the court is
"satisfied by a certificate of the
"[War Agricultural Executive
"Committee] that the person for
"whose occupation the dwelling-
"house is required by the land-

"lord is, or is to be, employed
"on work necessary for the
"proper working of an agricultural
"holding . . ."

(1) [1921] W. N. 291.
(2) 1933 S. C. 478.

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The schedule does not lay down what the certificate must contain, and all that is required is a certificate that a worker is necessary. In applying for a certificate, a farmer cannot limit himself to a particular person, who may fail him. He must be sure of getting the house before he can hope to find a worker. If the provision of the schedule be so strictly construed as to require the certificate to specify a particular person, *Knight v. Winter* (1) (which decided that the worker need not be named in the certificate) would be wrongly decided, for in that case there was no evidence before the committee identifying any particular person to be employed. Even if *Knight v. Winter* (1) did not expressly cover the present case, it has formed the basis of a universal practice throughout the country, of which the certificate in this case is an example. It may be desirable, but it is not essential, that the kind of worker should be specified in the certificate. [The Defence (Agriculture and Fisheries) Regulations, reg. 28A (St. R. & O. 1943, No. 582), which requires the committee to withhold the certificate in certain circumstances, was referred to.] The county court judge was also wrong on the second ground on which he refused to make an order for possession, namely, that an attempt ought to be made to secure one of other premises belonging to the farmer. Having established his right to secure accommodation for an agricultural worker, it is for the farmer to decide which of the dwelling-houses on his estate he will ask for. In this case the farmhouse was the only one with suitable accommodation for a foreman.

Ronald Hopkins for the defendant. Three things are necessary before the county court can make an order under para. (g) (ii.) of sch. I. to the Act of 1933. (1.) The court must be satisfied that it is reasonable to make the order; (2.) the premises must be reasonably required by the landlord; (3.) the work to be done must be of a certain kind, as to which the judge is circumscribed by the requirement that he must have the certificate of a particular committee. The judge has not found that it was reasonable to make the order, and if the court is against the defendant on the main question the case should be remitted to the county court for consideration of the whole question of reasonableness. As to (3.), the requirements of para. (g) (ii.) must be read as a whole. The requirements are (a) that the court is satisfied

(1) Unrep. April 24, 1942.

(b) by a certificate (c) that "the person" for whom occupation is required is, or is to be, employed (d) on work necessary. The court has got to be satisfied of (c) and (d) by means of the certificate. The requirement might be satisfied by the committee in several forms, but this certificate is, in effect, a blank cheque, specifying neither the amount nor the payee, or, in other words, identifying neither the worker nor the work. Nothing in *Knight v. Winter* (1) affects the necessity for the judge to be satisfied as to the nature of the work.

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LORD GREENE M.R. This case raises a difficult matter of the construction of para. (g) (ii.) of sch. I. to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. There would seem to be two possible constructions of that paragraph. The first is that, to be valid, the certificate must refer to a person who is identified, or is capable of identification by parol evidence, to the mind of the committee when the certificate is given, and that it must identify the work, which is the same thing as saying that it must identify the class of workman whom the committee is considering. The other possible construction is that the only matters of which the certificate is made the statutory and only admissible evidence are the work which has to be done and its necessity for the proper working of the holding.

Speaking generally, the former construction would lead to great practical difficulties and inconvenience. Agricultural workers are not standing in queues ready to be employed. It may be impossible for a farmer when he comes before the agricultural committee to say that he has a definite worker in contemplation, and, even supposing that he has, between the time when he obtains his certificate and the time when he goes to the county court judge that person may have engaged himself to somebody else. He would then have to go back to the committee and get another certificate, and the same thing might happen again. The consequence would be that these matters, often of urgency having regard to the seasonal requirements of labour on a farm, would be dealt with in a most unsatisfactory manner. The other construction would not only be more convenient, but would have the effect of confining the task of the committee to the particular matter of which it has expert knowledge, namely, the question whether the work on which the man is going to be employed is necessary

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for the proper working of the holding. Bearing in mind those considerations, although, of course, they are by no means conclusive, it appears to me that the second construction is preferable. Paragraph (g) first mentions matters which are to be established to the satisfaction of the court, not by a certificate, but by evidence in the ordinary way. One is that the dwelling-house is reasonably required by the landlord for occupation as a residence for some person. Another is that that person is engaged in the landlord's whole time employment, or that he is one with whom, conditional on housing accommodation being provided, a contract for such employment has been entered into. The next step, that the person in question is to be employed on work of a certain character, is to be proved, not by evidence in the ordinary way, but by the certificate mentioned in para. (g) (ii.). Looking at sub-para. (ii.) on the basis of that construction, the phrase "the person for whose occupation the dwelling-house is required by the landlord is, or is to be, employed" is merely referential, referring back to the matters specified in the opening words of para. (g) which have to be proved by evidence before the county court judge, and it is only when one comes to the words "work necessary for the proper "working of an agricultural holding" that one gets the matter which is really the special matter for the consideration of the committee. It is, therefore, for the county court judge to be satisfied on evidence in the ordinary way that the house is required for a person who is, or is to be, employed, and he has to be satisfied by the certificate as to the nature of the work on which that person is to be employed, and it matters not that when the certificate was obtained no person was in contemplation because it is sufficient when the farmer comes before the county court judge for him to prove that he has a person for whom the house is required and that the work on which he proposes to employ him is so and so.

That still leaves the second point, namely, what the certificate should say with regard to the nature of the work. The words "the agricultural worker" are used in the certificate without specifying that the man was to be a foreman. That implies, it is suggested, that the nature of the work has not been indicated by the committee in its certificate, and that ought to be done. In my opinion, although it is not necessary for the committee to mention in its certificate an actual person, either by name or by something from which

he can be identified, it is unquestionably the duty of the committee to consider what is the work for which it is alleged that a person is necessary. That is the very thing that they have to consider. Any committee would be bound to direct its attention to that question, and if it did not do so, it would not be carrying out its duty. In the present case the certificate was not attacked before the county court judge on the ground that the particular type of agricultural worker or the type of work on which he was to be employed was not mentioned on its face, but, if the county court judge was not satisfied on that matter, I apprehend that he could have sent the certificate back and asked the committee to specify the type of worker in respect of whom the certificate had been granted or the type of work he was to do. The plaintiffs were not asked to do that because it must have been obvious that there could be only one answer, namely, that the application to the committee had been in respect of a foreman and that the committee had a foreman in mind when they granted the certificate, otherwise they would not have been doing their duty. I cannot attach any importance to the fact that in a printed document the words "agricultural worker" are inserted by the executive officer of this committee. He would have been better advised to have put in "agricultural foreman," but his omission to do so and the insertion of "agricultural worker" instead still leaves it open to identify the particular type of worker referred to. There was never any substance in this point, which is a good reason why nobody ever took it before. The real point before the county court judge was the suggested necessity of identifying an actual person in contemplation when the certificate was granted.

In my opinion, for the reasons I have given, that is not the true construction of these provisions. There is authority on the matter. It is not very satisfactory because there is no adequate report of it, but when such material as we have is examined it appears to have covered this precise point. It was *Knight v. Winter* (1), decided in this court on April 24, 1942, by MacKinnon L.J., Lord Clauson and Goddard L.J., and it was the decision referred to at the foot of the certificate in this case. There the certificate had merely referred to "a person." There was no evidence before the county court judge that at the date of the application to the committee any particular person was in the contemplation of the

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committee or mentioned to the committee. It was argued that the certificate was bad on its face and that the judge had no right to accept it for the same reason as is given here, namely, that the certificate must name, or, at any rate, contemplate an individual identified and identifiable at the time. We have been furnished with the judge's note of the evidence and the certificate in that case, which the county court judge in the case before us had not the advantage of having before him, and we have a short note of the decision in a periodical. It seems to me that that decision is exactly in point, so far as it is possible to extract its terms from the papers we have had before us, and if I may say so with great respect to those who were parties to it, that it was right. It is only because the only existing authority was not the subject-matter of a report that I have thought it right to examine the question *de novo*.

The only other point which was taken was that, if we decided the first point against the defendant, the case would have to go back to the county court judge because he would still have a function to perform, namely, to consider whether it is reasonable to make an order. It is said this court ought not to usurp the function of the county court judge and that it ought to be referred back to him to decide that matter. It is not argued that the requirement that the dwelling-house is reasonably required by the landlords is not satisfied, but it is said that the county court judge must still be satisfied, under s. 3, sub-s. 1, of the Act, that it is reasonable to make an order. We have all the evidence before us, and I am prepared to go so far as to say that on that evidence it would not be open to a reasonable man to say it was other than reasonable to make an order. Apart from that, the judge in his written note dealt only with the point of law. I construe what he wrote, coupled with what we are told he said, as indicating clearly that the only matter which prevented him from making an order was the question of law by which he regarded himself as bound. That question having now been answered in a different way, the appeal should be allowed and an order for possession should be made.

MACKINNON L.J. I agree. In my view, with regard to para. (g) of sch. I. to the Act, these propositions are true: (a) It is not necessary for an applicant to the War Agricultural Executive Committee to have made a contract of employment with a particular worker before he so applies; (b) it is not

necessary for him to specify any particular person with whom he proposes to contract before he so applies ; (c) it is sufficient for him to specify the class of worker whom he desires to engage. It follows, as was held by this court in *Knight v. Winter* (1), that the committee need not mention the name of the proposed employee in their certificate but may issue their certificate as to a worker of a particular class without having any specific worker of that class in their mind. To those propositions, which are essential, I would add, as a recommendation for the smooth working of this machinery, that it is desirable for the committee in its certificate to state the class of worker in respect of whom an application has been made to them. In the light of those rules I see no reason why the machinery of this Act should not work in a satisfactory and businesslike way.

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DU PARCQ L.J. I agree on the main point. I think that we are assisted by the decision in *Knight v. Winter* (1), as to the accuracy of which I agree with what was said by the Master of the Rolls. I agree that the question for the committee is whether the landlord needs a workman to do work necessary for the proper working of an agricultural holding. It is true, as was pointed out by Mr. Denning, that there are other matters which the committee may have to go into now by reason of reg. 28A of the Defence (Agriculture and Fisheries) Regulations, 1939, but those duties are, for the purpose of the county court judge's inquiry, irrelevant. I also entirely agree with what has been said about the desirability of precise statements in the certificate of the agricultural committee as to the kind of worker they have been considering. In this case, as it turned out, the matter was not of importance because the evidence before the county court judge was conclusive to show that the committee had considered the question of the employment of a foreman, but difficulty easily may arise because there may be disputes as to the precise matters investigated by the committee. I do not know what their procedure is, nor how much the matter is discussed in the absence of the parties concerned. Obviously, they are entitled to talk the matter over, as any tribunal may, in private. I do not know in what form the decision is announced at the end. If all that happens is the handing out of a certificate, it is most desirable that it should state the nature of the work with some particularity

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so that there can be no dispute before the county court judge. If a dispute should develop I do not see what the county court judge can do except send the certificate back to the committee, since he is not entitled to decide the matter himself.

On the other part of the case I only wish to say this. The overriding words in s. 3, sub-s. I, are: "the court considers 'it reasonable to make . . . an order.'" I agree with Mr. Hopkins that that is essentially a question for the county court judge. If he has reviewed the facts and has come to the conclusion that it is not reasonable to make an order, this court ought not to interfere merely because in its view it would have been reasonable to make an order. There may be cases where there is no evidence on which the county court judge could say it is not reasonable to make an order, or, again, the county court judge may misdirect himself as to the meaning of the word "reasonable." Then this court has jurisdiction. In the present case I doubt whether there was any evidence on which the judge could have said that it was not reasonable to make an order. He certainly did not say that, and I do not think he had the slightest intention of saying that there was any ground for refusing an order except the point of law on which he relied. I only say this, not because I differ at all from what was said by my Lord, but because it is of great importance, as I venture to think, that parties should understand that appeals on the ground that the county court judge was wrong in thinking that in all the circumstances it was not reasonable to make an order are not likely to be listened to sympathetically in this court as a general rule.

Appeal allowed: order for possession.

Solicitors for plaintiffs: *Stafford Clark & Co., for Soanes & Welch, Witney, Oxon.*

Solicitors for defendant: *Preston, Lane-Claypon & O'Kelly, for Andrew Walsh & Son, Oxford.*

J. W. H.

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Feb. 23, 24,

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Mar. 4, 5, 24.

Patent—Right of Crown to use patented invention—Power to interfere between patentee and licensee—Effect on royalty agreement—Provision for minimum payment—Patents and Designs Acts, 1907 to 1939, s. 29, sub-s. 1.

Licensees were manufacturing a patented invention and paying a royalty to the licensors under a licence which also provided that the minimum amount of the aggregate of the royalties payable by the licensees in respect of each machine unit operated should never be less than the sum which would be payable in respect of each unit if working at one half of its full capacity. A government department to whom the licensees were supplying the product of the patented invention authorized in writing the licensees to use the patented invention for the services of the Crown and directed them in future (1.) to include no royalty payable under the licence in the prices charged for the product, and (2.) to pay no royalty to the licensors in respect of the product supplied for the services of the Crown, stating that they (the government department) would settle any claim of the licensors. The licensees complied with the directions :—

Held, that, under s. 29, sub-s. 1, of the Patents and Designs Acts, 1907 to 1939, the terms of the licence were inoperative so far as concerned the use of the invention for the services of the Crown, and, therefore, no royalty in respect thereof was due from the licensees to the licensors, but that the provision in the licence for the minimum payment was not affected by the sub-section and remained operative.

ACTION in the commercial list tried by Atkinson J.

The plaintiffs (hereinafter called "the licensors") owned letters patent of inventions relating to boxes, cases and containers made without nails. By a deed executed on July 5, 1935, the licensors granted the defendants an exclusive licence to use those inventions and to use and sell the products manufactured, the consideration being the payment of 40,000*l.* in cash and of a royalty of five-eighths of a penny per double yard of channelled metal strip produced by every machine unit operated (after a fixed number of double yards of channelled metal strip had been produced from certain units). By cl. 7 : "Unless the aggregate of the royalties payable "by the licensee in respect of each unit operated by the licensee "(except No. 1 unit . . .) under the provisions hereof during "the first six months following the expiration of one year "from the date upon which payment of the first monthly "instalment of royalties in respect of such unit commences

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"amounts to a sum equivalent to that which would have been payable if such unit had been operated at one quarter of its full capacity the licensee shall pay to the licensor such an amount as together with the actual amount paid and/or payable shall equal the sum which would be payable in respect of such unit if working at quarter of full capacity. "Similarly for the succeeding six months and thereafter during the continuance of this licence in respect of each period of six months the minimum amount to be paid by the licensee in respect of each unit shall never be less than the sum which would be payable in respect of each unit if working at one half of the full capacity of such unit "The maximum capacity of each unit shall be declared and guaranteed by the licensor upon installation of such unit from which shall be calculated the full capacity of each unit based on the amount of double yardage of channelled metal strip capable of being produced and affixed to the relative boxes cases and containers during a fifty week year of normal union working hours with a twenty per cent. allowance for fall-off and a further reasonable allowance for fall-off due to wear and tear whereby such unit is unable to maintain full capacity." By cl. 16: "The licensee shall not during the continuance of this licence use, import, export or sell or deal in the products except under and in pursuance of this licence." In 1939, 1940 and 1941 the licensees supplied containers to certain companies who were acting as agents for the Secretary for Air, and on all these boxes they paid to the licensors royalties due under the deed of July 5, 1935. By a letter of December 10, 1941, the Director of Contracts of the Ministry of Aircraft Production, acting on behalf of the Air Ministry, requested the licensees to include no royalty in the prices charged for containers manufactured for the services of the Crown after December 31, 1941, and to pay no royalty in respect of such containers. The letter continued: "In order that manufacture of containers may continue according to law, you are hereby authorized to use my patents so far as such use is necessary in the manufacture of containers for the services of the Crown. This authority is given under ss. 29 and 58A of the Patents and Designs Acts, 1907-39 (1). The department will deal with and settle any claims arising out of the use of such patents within

(1) By s. 29, sub-s. 1, of the Patents and Designs Acts, 1907 to 1939: "A patent shall have to all intents the like effect as

"the terms of this authority." By a subsequent letter from the ministry, dated February 5, 1942, the licensees were informed that the request contained in the letter of December 10, 1941, applied "to all containers supplied either directly or indirectly for the services of the Crown whether the containers are ordered from you by this department or by other departments or by other contractors." The licensees having complied with the terms of the letter of December 10, 1941, and the licensors having failed to obtain from the Ministry of Aircraft Production recompense for the use of their letters patent, the licensors brought this action against the licensees claiming an account of royalties due after December 31, 1941, under the licence contained in the deed of July 5, 1935, and payment thereof and damages for breach of contract, being interest on any sum found due to the licensors.

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Granville Sharp and *Diplock* for the licensors.

The licensees, who, in fact, are putting the case for the Crown, rely on the last sentence of the proviso to s. 29, sub-s. 1, of the Patents and Designs Acts, 1907 to 1939,—namely, "the terms of any agreement or licence concluded between the inventor or patentee and any person other than a government department, shall be inoperative so far as concerns the making, use or exercise of the invention for the service of the Crown"—as justifying the letter of the Ministry of Aircraft Production dated December 10, 1941, directing them to pay no royalty in respect of containers made for the Crown and their acquiescence in that direction. Where, however, a patentee has granted a licence to licensees to use the invention, s. 29, sub-s. 1, has no application. The main provision of the sub-section is to make the Crown liable to an action

"against His Majesty the King as "it has against a subject: Pro- "vided that any government "department may, by themselves, "or by such of their agents, con- "tractors, or others as may be "authorized in writing by them at "any time after the application, "make, use or exercise the inven- "tion for the services of the Crown "on such terms as may, either "before or after the use thereof, "be agreed on, with the approval	"of the Treasury, between the "department and the patentee, or, "in default of agreement, as may "be settled in the manner herein- "after provided. And the terms "of any agreement or licence "concluded between the inventor "or patentee and any person other "than a government department, "shall be inoperative so far as "concerns the making, use or "exercise of the invention for the "service of the Crown. . . ."
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for infringement, if it uses an invention without the consent of the patentee, and the terms of the proviso are limited by and must be considered only in reference to the main enactment: *Dormer v. Newcastle-upon-Tyne Corporation* (1), *Rex v. Dibdin* (2), *Mullins v. Treasurer of the County of Surrey* (3), *Duncan v. Dixon* (4). If a government department contracts with a firm, not a licensee, to make a patented article, there would be an infringement but for the provision of s. 29, sub-s. 1, which enables the department to make, or authorize the making of, the patented article for the services of the Crown and to settle with the patentee as to payment, but where there is already an authorization by the patentee to the licensee to use the invention there is no use of the invention under the sub-section which the government department can authorize. The letter of the Ministry of Aircraft Production of December 10, 1941, purported to authorize the licensees to use the invention for the services of the Crown, but the licensees did not require such authorization. They already possessed it under the then licence. Where, therefore, there is a licence from the patentee, s. 29, sub-s. 1, does not apply because the government department is not then using the invention, but merely ordering goods from the licensee who, by the terms of the licence, is already using the invention. The proviso to s. 29, sub-s. 1, can only relate to user which, but for the proviso, would be unlawful under the enacting terms of the sub-section. If, by the sub-section, it had been intended to abrogate the terms of contracts made between licensors and licensees this would have been clearly stated in the sub-section. The last words of the proviso—that “the terms of any agreement or licence concluded between the inventor or patentee and any person other than a government department shall be inoperative”—refer to an agreement or licence between the patentee and a manufacturer made after the government department has authorized the manufacturer to use the invention. The licensors, therefore, are entitled to the royalties which they claim. [*Feather v. Reg.* (5); *Dixon v. London Small Arms Co.* (6); *Steers v. Rogers* (7); *Rowland v. The Air Council* (8); *Nokes v. Doncaster Amalgamated Collieries, Ltd.* (9); *Pyrene Co., Ltd. v. Webb Lamp*

(1) [1940] 2 K. B. 204.

(2) [1910] P. 57, 125.

(3) (1880) 5 Q. B. D. 170.

(4) (1890) 44 Ch. D. 211.

(5) (1865) 6 B. & S. 257.

(6) (1876) 1 App. Cas. 632.

(7) [1893] A. C. 232, 235.

(8) (1923) 40 R. P. C. 87.

(9) (1940) 109 L. J. (K. B.) 865.

Co., Ltd. (1); *In re an Arbitration* (2); and *Fender v. St. John-Mildmay* (3) were cited.] Even if the licensors are wrong on this point, they are entitled to a minimum payment under cl. 7 of the deed of July 5, 1935, on the hypothesis that each unit was working at one half of its full capacity. The questions whether the licensees are making containers for the service of the Crown or not or whether the licensees are being paid in respect of the royalties which by the terms of the deed of 1935 are payable by the licensees to the licensors are irrelevant in considering the effect of cl. 7. "The sum which would be payable in respect of each unit if working at one half of the full capacity of such unit" is a minimum payment for the enjoyment of an exclusive licence. The provision in cl. 7 that "the maximum capacity of each unit" shall be declared and guaranteed by the licensor "upon installation of such unit from which shall be calculated the full capacity of each unit" is not a condition precedent to the minimum payment under cl. 7. It is merely part of the machinery for computing the "full capacity" on which the minimum payment is based.

Sir Walter Monckton K.C. and *Valentine Holmes* for the licensees. The provisions of s. 29, sub-s. 1, confer on a government department an authority to use a patented invention for the services of the Crown whether or not the person authorized to use the invention is manufacturing under a licence from the patentee. There is no reason to limit the terms of the proviso to a person using the invention who, apart from the proviso, would be an infringer. That is clear from the terms of the sub-section, and it is emphasized by its last words: "the terms of any agreement or licence concluded between the inventor or patentee and any person other than a government department shall be inoperative so far as concerns the making, use or exercise of the invention for the service of the Crown" It is to a licensee that this language most naturally applies, for, if a government department authorizes the use of the invention by a manufacturer who does not hold a licence from the patentee, the provision that the terms of such a licence is inoperative is not required. It has been suggested that these words are designed to prevent a manufacturer without a licence whom a government department authorizes to make a patented

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(1) (1920) 37 R. P. C. 57.

(2) [1942] 1 K. B. 222.

(3) [1938] A. C. 1.

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invention going to the patentee and procuring a licence, but the words of the sub-section are: "the terms of any agreement "or licence *concluded* . . . shall be inoperative," not "to be "concluded." The object of the proviso is that a government department shall be able to authorize a manufacturer to use an invention on reasonable terms, without paying a price loaded with royalty. The provision in the deed of July 5, 1935, for the payment of a minimum sum is not operative for three reasons. First, the provision in cl. 7 that: "the "maximum capacity of each unit shall be declared and "guaranteed by the licensor upon installation" is a condition precedent to liability under the clause, and it has not been fulfilled. Secondly, the provision for payment of the minimum sum is for the case of idle machines, but these machines were being operated every day and all day for the service of the Crown. Thirdly, the clause is inoperative by reason of the proviso to s. 29, sub-s. 1. If it were not so, the licensors would get paid twice, once by the government department under the sub-section and again by the licensees under the minimum royalty clause.

Granville Sharp replied.

Cur. adv. vult.

Mar. 24. ATKINSON J. At the outset, I desire to say that, although I agree that the Ministry of Aircraft Production have a right as agents of the Air Ministry, by themselves, or by such of their agents, contractors, or others as may be authorized in writing by them, to use an invention for the services of the Crown within the meaning of s. 29, sub-s. 1, they cannot authorize others to use the invention on behalf of another government department, as, for instance, the Admiralty, unless proof is given that that other department has constituted the Ministry of Aircraft Production its agent for that purpose. Further, on the evidence, I am satisfied that the licensees come within the words of s. 29, "agents, contractors, or others as may be authorized in "writing by them," i.e. by the Air Ministry. A reason for the amendment of s. 29 made by the Patents and Designs Act, 1919, by the words as applied to agents, contractors or others, "as may be authorized in writing," will be found in the judgment of Sargant J. in *Aktiengesellschaft Fur Autogene Aluminium Schweissung v. London Aluminium Co., Ltd.* (1).

(1) (1923) 40 R. P. C. 107, 116.

The licensors put forward two main contentions. They say that the proviso to s. 29, sub-s. 1, can only relate to user which, but for the proviso, would be unlawful under the enacting terms of the sub-section; that there was nothing unlawful in a government department ordering boxes from the licensees; and, therefore, if the licensees accepted the order, they must pay the royalty which they agreed to pay. There was no power conferred on a government department by s. 29, sub-s. 1, to interfere as between patentee and licensee, and so the sub-section gave no warrant for the letter of December 10, 1941. Alternatively, the licensors say that, at the least, they are entitled to a declaration that cl. 7 of the deed of July 5, 1935, relating to minimum royalties or payment is still effective.

To deal with the first point, counsel for the licensors contends that when the agent of the government department who is using the invention is a licensee neither the government department nor the licensee is using the invention by virtue of the statute. They are using it only by virtue of the licence under which the licensor has a right to receive a royalty. Precisely the same user could have been made of the patent if the proviso were not there. The principle on which the licensors rely is stated in *Rex v. Dibdin* (1) thus: "The fallacy of the proposed method of interpretation is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on the main enactment." In my opinion, the argument put forward on behalf of the licensors would be sound if the proviso to s. 29, sub-s. 1, referred merely to use of the invention, but it goes on to permit such use on such terms as may be agreed between the government department and the patentee with the approval of the Treasury, or, in default of agreement, as may be settled in the manner provided by the section. The section, therefore, deals not only with the use of an invention, but with its use on terms which are not otherwise possible. That is emphasized by the last words of the proviso that "the terms of any agreement or licence concluded between the inventor or patentee and any person other than a government department shall be inoperative so far as concerns the making, use or exercise

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"of the invention for the service of the Crown." The broad intention of the sub-section is that the Crown shall not be entitled to use a patent without recompensing the patentee, but the Crown is not to be forced to pay whatever the patentee may demand or what a licensee has had to agree to pay to get his licence. That which the Crown must pay is to be ascertained in the way provided for in the sub-section. In my opinion, therefore, neither the ministry nor the authorized agents or contractors of the ministry, when using this invention for the service of the Crown, are liable to pay the licensors for such user any royalty other than a sum arrived at as provided for by the statute.

I have, therefore, to consider the licensors' alternative claim for minimum royalties. That depends in part on the construction of cl. 7 of the licence and in part on the effect of s. 29, sub-s. 1, on the obligation, whatever it may be, contained in that clause. Bearing in mind the provisions of cl. 16 that the licensee shall not during the continuance of the licence use, import, export, sell, or deal in the product except under and in pursuance of the licence, it is clear that the words "if working at one half of the full capacity of such unit" must mean, "if working *under this licence* at "one half of the full capacity of such unit." As, since the end of 1941, the licensees have been working for the most part for the services of the Crown, the royalties payable have not amounted to that which would have been payable if each machine unit had been working to half of the full capacity, and, in my view, the licensors are right when they say that the event has happened on which the minimum payment provided by cl. 7 is due. Three reasons are advanced by the licensees against their being liable for this minimum payment. First, it is said that the minimum payment is only due if the machine is idle, but I can see no reason for this limitation if the clause is given its prima facie meaning. It would be strange if the minimum payment were due when a machine unit was idle for want of work, but that it was not to be payable when the machine unit was working, as it was here, for twenty-four hours a day and seven days a week. The second argument is that, as the effect of s. 29, sub-s. 1, is that the terms of the licence are to be inoperative so far as concerns the making, use or exercise of the invention for the service of the Crown, thus preventing the payment of the royalty under the licence to the licensors, it also prevents this minimum payment under the licence.

Under cl. 7 the minimum payment is not payable in respect of anything made under the licence. It is payable in respect of what is not made under the licence. I cannot see that cl. 7 has any relation to the making, using or exercising of the invention for the service of the Crown. The licensees have accepted orders in breach of cl. 16 of the deed, orders on which they have made large sums of money and for which the licensors have been paid nothing. Lastly, it was said by the licensees that the words in cl. 7: "The maximum capacity of each unit shall be declared and guaranteed by the licensor upon installation of such unit from which shall be calculated the full capacity of each unit," meant that this declaration and guarantee on the installation of the unit was a condition precedent to the minimum royalty clause coming into operation, but the ascertainment of the "maximum capacity" of a machine unit is merely a step in the ascertainment of the "full capacity" of that unit. Had the words of the clause read: "The maximum capacity of each unit, from which shall be calculated the 'full capacity' of each unit based, etc.," shall be declared and "guaranteed by the licensor upon installation," this contention of the licensees would not have been arguable, but that is what I think was meant by the words used. There is no statement in the clause that it is only to be operative if the maximum capacity is declared and guaranteed, and, in my opinion, this declaration and guarantee was not a condition precedent to liability under cl. 7. If I am wrong in this conclusion, it seems to me that this declaration and guarantee were in fact waived by the licensees, as has now been pleaded in the reply of the licensors.

I make a declaration that the minimum royalty under cl. 7 of the deed of July 5, 1935, is still operative and effective, notwithstanding the provisions of s. 29, sub-s. 1, of the Act of 1919, but the calculations under it cannot be made until the licensors have pursued their remedy against the Crown under the terms of s. 29.

Declaration accordingly.

Solicitors for licensors: *Markby, Stewart & Wadesons.*

Solicitors for licensees: *George Martin & Co.*

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PROPRIETARY, LD.
v.
NO-NAIL
BOXES, LD.
Atkinson J.

1943

BUDD v. ANDERSON AND OTHERS.

June 1, 2, 3,

II.

False imprisonment—Emergency legislation—Detention under Defence (General) Regulations, 1939, reg. 18B (1A)—Ground of detention wrongly stated in copy of order served on person detained—Habeas corpus—Res judicata.

The Home Secretary, acting under reg. 18B (1A) of the Defence (General) Regulations, 1939, made an order for the detention of the plaintiff on the ground that he had been a member of an organization of the kind specified in the regulation. An official in the Home Office made copies of this order in triplicate, one copy being handed to the governor of the prison where the plaintiff was to be detained, another to the police officer who made the arrest, and the third to the plaintiff on his arrest. The copies were inaccurate in that they gave as the ground of the detention that the plaintiff was a person of hostile associations, a ground of detention under reg. 18B (1.), but the trial judge found that the plaintiff was not in fact misled by this mistake. On an application by the plaintiff for habeas corpus, the Divisional Court ordered his release from detention, the ratio decidendi of the majority of the court being that there had been a breach of reg. 18B (4.) which required that the Home Secretary should secure that any person against whom an order of detention was made under reg. 18B should be afforded the earliest opportunity of making to him representations in writing with respect to the order. In an action by the plaintiff claiming damages for false imprisonment against the Home Secretary who made the order, his successor in office who continued the detention under that order, and the official in the Home Office who made the inaccurate copies :—

Held, that the decision of the Divisional Court was not res judicata for the purpose of the present proceedings; that the fact that the plaintiff had been deprived of his rights under reg. 18B (4.) did not invalidate the order for his detention, especially as he had not been prejudiced by that deprivation; and, therefore, that the plaintiff was not entitled to succeed.

Liversidge v. Sir John Anderson [1942] A. C. 206, and *Greene v. Home Secretary* [1942] A. C. 284 applied.

ACTION tried by Asquith J.

On June 11, 1940, the first defendant, Sir John Anderson, then Home Secretary, made an order under reg. 18B (1A) of the Defence (General) Regulations, 1939, for the detention of the plaintiff and twenty-four other persons, the ground of the plaintiff's detention, as stated in the order, being that he had been a member of the British Union of Fascists, an organization of the kind specified in the regulation. Reg. 18B contained no express provision that any copy or notice of an

order of detention should be served on a person about to be detained at the time of arrest, but in practice a copy or summary of such an order in triplicate was made at the Home Office, and one copy was handed to the person to be detained, a second to the governor of the prison where he was to be detained, and a third to the police officer effecting the arrest. One June 15, 1940, the third defendant, T. B. Williamson, an official in the Home Office, in making out a copy or summary of the order of June 11, 1940, stated, inaccurately, that the ground of the plaintiff's detention was that he was a person of hostile associations (a ground for detention under reg. 18B (1.)) and, accurately, that the Home Secretary made the order in pursuance of reg. 18B (1A). The plaintiff was handed this document when he was arrested. On July 25, 1940, the advisory committee appointed under reg. 18B (3.) and acting in pursuance of their duty under reg. 18B (5.) informed the plaintiff in writing correctly that he was detained because he had been a member of an organization specified in reg. 18B (1A). On May 27, 1941, habeas corpus proceedings brought by the plaintiff were heard by a Divisional Court. Humphreys J. criticized the order of June 11, 1940, on three grounds: (1.) that it dealt with twenty-five persons, one of whom was the plaintiff, en bloc, so that it must have been difficult for the Home Secretary to have given individual attention to each case, (2.) that it failed to recite that the Home Secretary thought it necessary to exercise control over the plaintiff, and (3.) that the Home Office had no reasonable grounds, objectively, for detaining him. Singleton and Tucker JJ. relied solely on reg. 18B (4.) by which: "It shall be the duty "of the Secretary of State to secure that any person against "whom an order is made under this regulation shall be afforded "the earliest practicable opportunity of making to the Secretary "of State representations in writing with respect thereto . . .," and held that the Home Secretary had not complied with this duty since the plaintiff had been left in ignorance, or, at least, in doubt, as to the precise ground of his detention. The Divisional Court, accordingly, held that the plaintiff's detention was illegal and they ordered his release. He was afterwards re-arrested under reg. 18B, but was released in May, 1943. He now brought this action claiming damages for false imprisonment in respect of his first period of detention against the first defendant, Sir John Anderson, the Home Secretary, as having caused the original detention; the second defendant,

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the Rt. Hon. Herbert Morrison, his successor in office, for having continued the detention; and the third defendant, T. B. Williamson.

Scott Henderson and *Harold Brown* for the plaintiff. The plaintiff's first detention was illegal and on that ground he was discharged from detention by the Divisional Court. He is entitled, therefore, to maintain this action for false imprisonment.

Sir Donald Somervell A.-G. and *Valentine Holmes* for the defendants. The proceedings in habeas corpus did not result in *res judicata* for the purposes of this action. In the old cases, proceedings in habeas corpus often turned on the technicalities of the return to the writ: *Deybel's case* (1), and, if the person released brought an action for false imprisonment, the defendant was entitled to call evidence to show that the imprisonment was justified. Further, in the present case the parties in the two proceedings are not the same. The grounds on which the Divisional Court released the plaintiff are no longer valid. *Humphreys J.* based his decision on the invalidity of the order of June 11, 1940. His first ground for so holding was dissented from in *Stuart v. Anderson and Morrison* (2), and his second in *Rex v. Governor of Brixton Prison. Ex parte Pitt-Rivers* (3), while the third was overruled in *Liversidge v. Sir John Anderson* (4). *Singleton and Tucker JJ.* based their decision on a breach by the Home Secretary of reg. 18B (4.), but in *Greene v. Home Secretary* (5) the House of Lords held that a breach by the chairman of the advisory committee of reg. 18B (5.) did not invalidate the order, the production of which constituted a complete and peremptory answer to the application for habeas corpus, and they would presumably regard a breach of reg. 18B (4.) in the same light. Authorities dealing with ordinary legal processes do not assist the court because, in dealing with such a regulation as 18B, one would expect the law to be more elastic and the procedure less technical. The regulation has to be administered in times of great urgency and by executive, not judicial, officers. In *Crowther v. Ramsbottom* (6) Lord Kenyon C.J. said: "I never understood that a man was "obliged to justify a distress for a cause which he happened

(1) (1821) 4 B. & Ald. 243.

(2) (1941) 165 L. T. 120.

(3) [1942] 1 All E. R. 207.

(4) [1942] A. C. 206.

(5) [1942] A. C. 284.

(6) (1798) 7 T. R. 657.

"to assign at the time it was made. If he can shew that he
"had a legal justification for what he did, that is sufficient."

This detention of the plaintiff was valid and its justification was the order of detention made by Sir John Anderson: *Liversidge v. Sir John Anderson* (1) and *Greene v. Home Secretary* (2). The third defendant, Mr. Williamson, was not the agent of the Home Secretary and the only persons who can be sued in such an action for false imprisonment are the Home Secretary or the governor of a prison where the plaintiff was detained. The inaccurate copy in no way invalidated the original order of June 11, 1940. The evidence showed that the plaintiff was aware that he was detained because of his past association with the British Union of Fascists. [ASQUITH J. It is strange that there should not be any authority where the facts are that a person has effected an arrest under an invalid authority when there is a valid authority in existence.] Holt C.J. said in *Grenville v. The College of Physicians* (3): "Suppose one has a legal and an illegal warrant, and arrests "by virtue of the illegal warrant, yet he may justify by virtue "of the legal one; for it is not what he declares, but the "authority which he has is his justification." In this case, however, there was only one order of detention, that made by Sir John Anderson on June 11, 1940, and the arrest was made pursuant to that order.

Scott Henderson and *Harold Brown* in reply. The habeas corpus proceedings in the Divisional Court were rightly decided. It may be that the order of June 11, 1940, was valid, but the true ratio decidendi of the decision was that relied on by Tucker J. and Singleton J., that the duty cast on the Home Secretary by reg. 18B (4.) had not been complied with. If an arrest is irregular, so is the detention which follows it. In the present case reg. 18B (4.) had to be complied with and the old habeas corpus cases are of no great assistance. In such proceedings what was essential was the document which the gaoler was given, because that was the document which was set out in his return to the writ. If he was acting on a spurious document his return would have been unlawful. It is true that, if there was a technical defect, the court would not conclude the matter then, but would want to see the conviction on which the commitment was based: *Rex v. Governor of Lewes Prison* (4). A conviction for a different cause from

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(1) [1942] A. C. 206.

(3) (1700) 12 Mod. Rep. 387.

(2) [1942] A. C. 284.

(4) [1917] 2 K. B. 254.

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that set out in the commitment would not cure the defect of a bad commitment: *Rogers v. Jones* (1). The first defendant unlawfully imprisoned the plaintiff after he knew the true facts on the return of the executed order. The second defendant was liable because the fact that he had a valid order in his possession did not help him if he took any part in continuing the detention, since the detention was unlawful if it started by being unlawful. The third defendant was clearly liable because he was the proximate cause of the plaintiff's illegal arrest.

Cur. adv. vult.

June 11. ASQUITH J. read a judgment in which he stated the facts, and continued: On a possible view of the law, it might be material to decide whether the plaintiff was in fact misled by the copy of the order of June 11, 1940, which was served on him, and I, therefore, record that, in my view, the evidence established that he was not misled into supposing that his membership or ex-membership of the British Union of Fascists had nothing to do with his arrest. He may, or might, have supposed that he was arrested on two charges: (a) hostile associations, and (b) membership of the British Union, but I am satisfied that he supposed (b) to be a ground, not necessarily the only ground, but a ground, of his detention.

The three objections raised by Humphreys J. to the order of June 11, 1940, have been disposed of respectively by the decisions in *Stuart v. Anderson and Morrison* (2), *Rex v. Brixton Prison (Governor)*. *Ex parte Pitt-Rivers* (3), and *Liversidge v. Sir John Anderson* (4). So clear is this that Mr. Scott Henderson, who argued the case for the plaintiff with such outstanding ability, was forced to concede that the Home Secretary's order of June 11, 1940, was valid.

I will assume in favour of the plaintiff in this case that a detention which is illegal to the extent of justifying his release on habeas corpus is also illegal for the purpose of enabling a civil action for false imprisonment to succeed. Where the facts on which the two courts have adjudicated are identical the assumption would seem not unreasonable, although I would reserve the question whether it is valid in all circumstances. Making this assumption in favour of the plaintiff, two further propositions seem to be plain, first, that the

(1) (1824) 3 B. & C. 409.

(2) (1941) 165 L. T. 120.

(3) [1942] 1 All E. R. 207.

(4) [1942] A. C. 206.

decision of the Divisional Court is not *res judicata* for the purpose of the present proceedings for false imprisonment, if only because the parties are different. Apart from that it is inherent in habeas corpus proceedings that they do not result in *res judicata*, at least if they fail. A number of successive applications can be made on the same facts. The second proposition, which appears to me to be plain, is that the ratio on which the majority of the Divisional Court proceeded is binding on me unless that ratio is in conflict with the decisions of superior tribunals which are binding on the Divisional Court itself. It is on this last issue, as it appears to me, that the decision in the present case turns.

While I hope that I am not lacking in zeal on behalf of the liberty of the subject, I cannot ignore decisions of the House of Lords or question their supremely binding character. I have come to the conclusion, not without doubt and difficulty, that the combined effect or result of *Liversidge v. Sir John Anderson* (1) and *Greene v. Home Secretary* (2) is inconsistent with the earlier decision of the Divisional Court, overrides the principle on which that decision proceeds, and compels me to decide the present case in favour of the defendants. *Liversidge v. Sir John Anderson* (1), although in form a decision on particulars, is in substance, if I may quote from Lord Macmillan (3), a decision that "the production by the Secretary of State of "an order of detention by him *ex facie* regular and duly "authenticated . . . constitutes a peremptory defence to any "action of false imprisonment and places on the plaintiff the "burden of establishing that the order is unwarranted, "defective or otherwise invalid." In the present case it is conceded that the order of June 11, 1940, is neither unwarranted nor defective nor otherwise invalid. It may be objected that part of the passage which I have cited was in the nature of a dictum. It may be said that the issue before the House of Lords was whether the production of the order was conclusive of the existence of reasonable grounds for detention, not whether it was conclusive for all purposes, and it may further be objected that in *Liversidge v. Sir John Anderson* (1) there was no breach of any paragraph of reg. 18B. There was no question, for instance, of the service of a defective copy of the order.

I, therefore, turn for further guidance to the other leading

(1) [1942] A. C. 206.

(3) [1942] A. C. 258.

(2) [1942] A. C. 284.

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House of Lords decision in this matter, *Greene v. Home Secretary* (1). In that case also there was a valid order made by the Secretary of State and an accurate copy served on the person detained, but there was a breach of reg. 18B (5.) which provides, among other things, that "It shall be the duty of "the chairman [of the advisory committee set up by reg. "18B (3.)] to inform the objector of the grounds on which the "order had been made against him and to furnish him with "such particulars as are, in the opinion of the chairman, "sufficient to enable him to present his case." The chairman of the advisory committee in *Greene v. Home Secretary* (1) failed to comply with this requirement, inasmuch as he misquoted the original order and misinformed the person detained as to the causes of his detention, but it was held that this mistake, although its result was that a provision of the regulation had been violated, did not invalidate the order of detention or divest the detention of the lawful character which it had originally possessed, and that that order constituted a complete answer to the appellant's demand for a writ of habeas corpus. There are two or three passages which I will venture to read from the judgments in that case. Lord Maugham said (2): "The other point argued before your "Lordships I think can be dealt with shortly. I agree with "all the judges who have considered this case that the appellant "has not shown that he was prejudiced by the error in the "document sent to him by the advisory committee. I also "agree with their view that a mistake in that document could "not in any event invalidate the original detention or render "its continuance invalid." Lord Macmillan said (3): "The "result, in my opinion, is that the production of the Secretary "of State's order, the authenticity and good faith of which is "in no way impugned, constitutes a complete and peremptory "answer to the appellant's application." Later he said (4): "The mistake, the occurrence of which your Lordships deplore, "does not in any way affect the validity of the detention order "which is the answer to the appellant's application. It affects "the due observance of the procedure prescribed for the "further consideration of the case of a person who is ex "hypothesi under lawful detention. Consequently the mistake "affords no ground for invalidating the detention order and "does not help the appellant in his present application."

(1) [1942] A. C. 284.

(2) Ibid. 296.

(3) Ibid. 297.

(4) Ibid. 298.

Finally, Lord Romer said (1): "It only remains to deal with the mistake in the document emanating from the advisory committee in professed pursuance of the duty cast upon the chairman of the committee by para. (5.) of the regulation. The mistake, of which no explanation has been given to your Lordships, was most regrettable. But it cannot affect the validity of the order that had been made by the Home Secretary nearly two months before. Had the appellant been prejudiced by the mistake, the court might nevertheless have afforded him some relief. But the matter was carefully considered both by the Divisional Court and the Court of Appeal. They came to the conclusion that the appellant had not been in any way prejudiced by the mistake, and I am satisfied that their conclusion was right." In that connexion I might mention that the judgment of Goddard L.J., in the Court of Appeal, which was accepted and approved by the House of Lords, suggested that, if one of these procedural provisions of reg. 18B were violated, the remedy might be by way of mandamus.

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In the present case the mistake in the copy of June 15, 1940, was only relied on by the majority of the Divisional Court as depriving the plaintiff of his rights under reg. 18B (4.), and I cannot believe that the House of Lords, having held that the deprivation of a person detained of his rights under reg. 18B (5.) did not invalidate his detention, would have held that a different result should have flowed from his being deprived of his right under reg. 18B (4.), especially where, as in my view is the case here (and I find it, in case it is necessary, as a fact), the person detained was not prejudiced by that deprivation. The rights secured by reg. 18B (5.) seem to me distinctly more valuable than those secured by reg. 18B (4.), and for a breach of the latter, even if he had been damnified, a mandamus would in my view have been a sufficient remedy.

Cases were cited to me dealing with the position where a valid conviction is followed by an irregular commitment, but those cases, which are not easy to reconcile with each other, shed only a wavering and uncertain light on the point which I have to determine. I would only add two observations which apply, if my reasoning is wrong. In the first place, I would add that the position of the gaoler, or, possibly, of the third defendant, but certainly of the gaoler, might in habeas corpus proceedings have been different in law from that of the

(1) [1942] A. C. 309.

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Home Secretary. Under the technical rules of habeas corpus it might have been argued that the copy of June 15, 1940, the only document which could be produced by the gaoler, would have been an insufficient "return." In an action against the Home Secretary, the Home Secretary could have produced the order of June 11, 1940, which is, on any possible view, valid. The existence of this valid order in the background is the basis of this judgment. Secondly, I would add that, if the detention was in fact illegal, the plaintiff's damage would have been merely nominal. If a true copy of the order had been served on him, all subsequent events, so far as one can judge, would have followed exactly the same course as they did. The only difference is that he would not in fact have been released for the short period between May 27, 1941, and the early part of June of that year. For those reasons, I give judgment for the defendants.

Judgment for the defendants.

Solicitors for plaintiff: *Oswald Hickson, Collier & Co., for Marsh & Ferriman, Worthing.*

Solicitor for defendants: *Treasury Solicitor.*

C. G. M.

C. C. A.

REX v. TOMPSON AND OTHERS.

1943
May 5, 6,
25.

Criminal law—Gaming house—Unlawful game—Card game—Test of lawfulness—Whether game one of mere skill—Questions for judge and jury—Gaming Houses Act, 1854 (17 & 18 Vict. c. 38), s. 4.

The Gaming Act, 1845, having repealed the provisions of the statute 33 Hen. 8, c. 9, in so far as they related to games of mere skill, though it left unrepealed its provisions relating to carding, a game of cards played for money in premises regularly kept for such gaming is not an unlawful game if it be a game of mere skill and is not one of the games which some statute has specifically declared to be illegal. When, therefore, criminal proceedings are taken against any one under s. 4 of the Gaming Houses Act, 1854, and the unlawful gaming alleged to be carried on on the premises consists of playing a game of cards for money, it is necessary to determine whether the game in question, not being a game specifically declared illegal by some statute, is or is not a game of mere skill, that is to say a game in which the element of chance is either not present or is so slight as to render the game one which could properly be said to be one of mere skill. This is a question of fact to be determined, when the proceedings are by indictment, by the jury and not a question of law, and in such cases the proper procedure is to direct the jury that if they come to the conclusion

on the evidence before them that the game is a game of mere skill as so defined, they should acquit, but if they find that it is not, they should convict. As games of cards are unlawful by virtue of the statute 33 Hen. 8, c. 9, the mere fact that the element of skill is the dominant or governing factor in the game will not render the game a game of mere skill.

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APPEALS from conviction.

The appellants, Charles Henry Oliver Tompson, Freda Poteliachow, and Phoebe Harrison, were tried at the county of London sessions on an indictment containing four counts. In the first count all three appellants were charged for that, they being persons having the care and management of certain premises at 36, Finchley Road, N.W., those premises were being used for the purpose of unlawful gaming being carried on there on October 8, and other days between October 8 and October 15, 1942. In the second count Tompson was charged for that he, being the owner of the said premises, permitted those premises to be used by Poteliachow for unlawful gaming on the aforesaid dates. On the third count Poteliachow was charged in that she used the said premises for unlawful gaming on the aforesaid dates. In the fourth count Harrison was charged for that she assisted in conducting the business of those premises, such premises being used for unlawful gaming on the aforesaid dates. All the charges were brought under s. 4 of the Gaming Houses Act, 1854, and to all of them the appellants pleaded Not Guilty. The Crown offered no evidence against Harrison on the first count, and she was, accordingly, acquitted on that count on the direction of the learned chairman. Otherwise the appellants were found guilty on all the charges against them and were fined and ordered to pay costs.

The premises were conducted as a club which had been carried on since September, 1939, the club having been first registered at other premises in 1933. Poker and bridge were played and the premises were used primarily as a poker and bridge club. The rules of poker as played at the club were proved, and certain police officers who had visited the club proved that on the dates in question poker was being played in accordance with those rules, and the several parts played by the appellants at the club.

At the trial the chairman of the sessions held that the question whether the game of poker, as played on the premises, was a lawful or an unlawful game was for him to decide and

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not for the jury, and he refused to allow the jury to consider that question or counsel to address the jury on it. He, however, allowed evidence to be called by the appellants to show that skill predominated over chance in playing the game. He then said that he was satisfied that poker was not a game of mere skill but that it was an unlawful game, and, therefore, the premises were being used for unlawful gaming within s. 4 of the Gaming Houses Act, 1854. The appellants were, accordingly, found guilty and fined. They now appealed against their conviction.

Beyfus K.C. and *Christmas Humphreys* for the appellants. The chairman was wrong in deciding the question whether or not unlawful gaming was being carried on on the premises. He should have left that question to the decision of the jury with a direction from him on the law. It was a question of fact for the jury only, and the chairman could only rule on their findings of fact, as a matter of law, that the game was unlawful: *Reg. v. Davies* (1), *Bracchi Brothers v. Rees* (2). Further, in considering the question whether this was a legal game, the chairman applied the wrong test, namely, whether it was a game of mere skill. That was a test which no game of cards, or, indeed, any game, could pass. What is required to make a game lawful is predominance of skill over chance, and that is the test which has generally been applied. The object of the statute 33 Hen. 8, c. 9, was not to stop gaming, but to ban all games which interfered with the practice of archery, a military exercise, and the Gaming Act, 1845, repealed that part of the statute of Hen. 8 which made the playing of games of skill unlawful. If the proper test is the predominance of skill or chance, that is a question of degree, and, therefore, of fact for the jury: per Ridley J. in *Bracchi Brothers v. Rees* (2). See also *Pessers, Moody, Wraith & Gurr, Ltd. v. Catt* (3); *Morris v. Godfrey* (4); *Davis v. Parker* (5), and *Rex v. O. K. Social and Whist Club, Ltd.* (6). *Rex v. Salisbury* (7), where it was laid down that "it is the duty of the judge, and not of the jury, to decide whether or not a game is unlawful," is in conflict with other cases and ought not to be followed.

(1) [1897] 2 Q. B. 199, 202.

(2) (1915) 84 L. J. (K. B.) 2022.

(3) (1902) 77 J. P. 429.

(4) (1912) 28 T. L. R. 401.

(5) [1931] 2 K. B. 210.

(6) (1929) 45 T. L. R. 570.

(7) [1939] 1 All E. R. 250, 252.

John Maude and Hamblen for the prosecution. A distinction must be drawn between cases dealing with games of cards and those dealing with games played on automatic machines. In the latter cases it has always been held that the question whether the game was unlawful depended on whether skill predominated over chance in the playing of the game, but "carding" was made unlawful by 33 Hen. 8, c. 9, and every game of cards is unlawful which is not a game of mere skill. Since the passing of the Gaming Act, 1845, "the only games made unlawful by 33 Hen. 8, c. 9, are games of dice or cards All such games, if they are games of chance, or games of chance and skill combined (which cannot be called games of mere skill), are within the meaning of the words unlawful games in [the Gaming Houses Act, 1854] namely, unlawful if played in a house kept for playing at them": per Hawkins J. in *Jenks v. Turpin* (1). That was cited with approval by Avory J. in *Rex v. Hendrick* (2). Therefore, if a game is a game of skill and chance combined, it is not a game of mere skill, and the material question in the present case was not whether skill or chance predominated in the playing of the game, but whether it was a game of mere skill. The question whether or not a game is unlawful is one of law for the judge and not one of fact for the jury: per Lord Russell of Killowen C.J. in *Reg. v. Davies* (3); *Rex v. Kirby* (4); *Rex v. Salisbury*, per Charles J. (5); *Rex v. Brennand*, per Avory J. (6). See also *Rex v. O. K. Social and Whist Club, Ltd.* (7), where it was held that the Recorder of Liverpool's ruling that the game of progressive whist was not a game of skill, and was, therefore, an unlawful game, was correct.

Beyfus K.C. in reply. No distinction is drawn in the Act of Parliament between games of cards and other games of chance. [He referred to *Morris v. Godfrey* (8).]

Cur. adv. vult.

May 25. The judgment of the court (VISCOUNT CALDECOTE C.J., HUMPHREYS and LEWIS JJ.) was read by LEWIS J.,

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(1) (1884) 13 Q. B. D. 505, 524.

(5) [1939] All E. R. 250, 252.

(2) (1921) 15 Cr. App. Rep. 149,

(6) (1930) 22 Cr. App. Rep. 95,

154.

100.

(3) [1897] 2 Q. B. 199, 202.

(7) (1929) 21 Cr. App. Rep. 119.

(4) (1927) 20 Cr. App. Rep. 12.

(8) (1912) 28 T. L. R. 401.

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who stated the facts, and continued : Before this court two grounds of appeal were argued by Mr. Beyfus, which he stated to be (1.) that the learned chairman, in considering whether unlawful gaming was being carried on on the premises, applied the wrong test, and (2.) that, in any event, he was wrong in withdrawing the case from the jury so that, as it was put by learned counsel, the verdict was not the verdict of the jury but the decision of the learned chairman. In other words, the contention was that the learned chairman was wrong in telling the jury that the question whether the game of poker as played in the club was an unlawful game was for him and for him alone, and that they must decide the case on the footing that the game was unlawful in the circumstances in which it was being played in the premises.

It seems to us that logically the second of these two contentions should be dealt with first and involves this question : Is it solely for the judge to decide whether a game that is being played is an unlawful game, or is it for the jury to decide as a question of fact ? What happened in this case was that the learned chairman, after argument and a consideration of some of the authorities, held that the question whether the game of poker as played on the premises was a lawful or an unlawful game was for him and not for the jury, and refused to allow the jury to consider that question at all or to allow counsel to address the jury on it, although he allowed evidence to be called by the appellants to show that skill predominated over chance, which counsel maintained in the circumstances of this case was the test whether or not the game was lawful. Such evidence was allowed to be called by the chairman for the following reason, to quote his own words : " You may call "experts with a view to influencing my mind, but I shall not "allow you to address the jury on the question." After four expert witnesses had been called and cross-examined (their evidence being that the game of poker as played in this club was a game in which skill largely predominated over chance), the learned chairman said : " I am quite satisfied "that poker is not a game of mere skill and it is an unlawful "game within the meaning of the statute and it follows from "that that these premises were being used for unlawful gaming. "I am also satisfied these are questions of law for me and I so "direct the jury." He then summed-up to the jury, telling them that the question whether poker as played in the club was an unlawful game was for him and it was for him to decide

whether premises were used for unlawful gaming. The only question he left to the jury was one about which he quite rightly said there was no dispute, namely, the part each of the appellants played in the matter, of managing the premises; permitting the premises to be used, or assisting in the conduct of the premises, respectively.

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It is axiomatic that in a criminal trial all questions of law are for the judge and all questions of fact are for the jury, and for a judge to take on himself to decide a question of fact, and, having decided it, to withdraw that question of fact from the consideration of the jury, is not in accordance with the law of England, and, in particular, that branch of it dealing with the right of every man to be tried by a jury. In times like the present national emergency it may be thought right for the safety of the realm to make regulations having the authority of law which curtail the right to trial by jury, but for this reason it is the more important that nothing should be allowed, except such enactments, to diminish in any way the right of the subject to trial by jury.

There have been a considerable number of cases from time to time before the courts of this country on the topic of unlawful gaming and of the respective provinces of the judge and jury in such cases, and it is not at first sight easy to reconcile the decisions. Some test has to be applied before it can be ascertained whether premises are being used for unlawful gaming in the sense of gaming therein at unlawful games, and it has been said "in using the words 'unlawful games' "it is clear the legislature intended them to cover and include "some games which being lawful in themselves were only "made unlawful when played in particular places or by "particular persons": see per Hawkins J. in *Jenks v. Turpin* (1). That learned judge pointed out in that case that since the Gaming Act, 1845, which repealed parts of the Act of 33 Hen. 8, c. 9, the only games unlawful per se were ace of hearts, faro, basset, hazard: see Gaming Act, 1738 (12 Geo. 2, c. 28); passage: see Gaming Act, 1739 (13 Geo. 2, c. 19); roulette: see Gaming Act, 1744 (18 Geo. 2, c. 34); every game of dice except backgammon: see Gaming Act, 1739 (13 Geo. 2, c. 19), and every game of cards which is not a game of mere skill. The Gaming Act, 1845, so far as is material, reads as follows: "Whereas the laws heretofore "made in restraint of unlawful gaming have been found of

(1) 13 Q. B. D. 516.

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"no avail to prevent the mischiefs which may happen there-
"from, and also apply to sundry games of skill from which the
"like mischiefs cannot arise, Be it enacted . . . that so much
"of an Act passed in the thirty-third year of the reign of
"King Henry VIII. intituled ' The Bill for maintaining artillery,
"and the debarring of unlawful games ' whereby any game of
"mere skill such as bowling, coytng, cloyshcayls, half bowl,
"tennis, or the like, is declared an unlawful game, or which
"enacts any penalty for playing at any such game of skill as
"aforesaid . . . shall be repealed." Dicing table or carding,
which were included in the Act of Henry VIII. as unlawful
games, were not specifically included in the repeal. It follows
from this that anyone who keeps premises for playing cards
for money, although the card game is not a game specifically
mentioned in the statutes above referred to, is guilty of
unlawful gaming unless the game is one of mere skill.

The question whether or not a game is one of mere skill
is, in our opinion, a question of fact. Indeed, in the present
case by allowing witnesses to be called as to the amount of skill
required to succeed at the game of poker the learned chairman
treated it as a question of fact although the evidence of these
witnesses was directed to show that in the game of poker as
played on these premises skill was the dominant factor and
not that the game was one of mere skill in the sense of skill
alone. Therefore, except in a case where the game in question
is one which is specifically made illegal by statute we think
that before a judge can rule that a card game is unlawful a
question of fact has to be decided by a jury, namely, is the game
one of mere skill or not. The jury having found that the game
is not one of mere skill on the evidence called before them,
then it is for the judge to say that the game is an unlawful
game, and, if that game is being played on premises
habitually used for such purpose, those responsible for the
conduct of those premises are guilty of unlawful gaming.
The proper course, in the opinion of the court, is that a jury
should be asked to give a general verdict of Guilty or Not
Guilty after the judge has directed them that the question
for their consideration is whether or not on the evidence
before them they are satisfied that the game is or is not one
of mere skill. If they think that the game is one of mere
skill, then the defendants are entitled to be acquitted, as
persons who use premises for the purpose of games of mere
skill being played therein are not guilty of unlawful gaming.

To adopt any other course would seem to be dictating the verdict of a jury instead of leaving the jury to find their own verdict on the facts, a course deprecated by the court in *Rex v. Hendrick* (1).

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In *Bracchi v. Rees* (2), which was an automatic machine case, the question whether a game was a game of skill or chance was clearly stated to be a question of fact. Lord Reading C.J. in that case said: "In my view it must be a question of fact in all these cases whether a particular game 'is or is not a game of chance,'" and Ridley J. said: "To 'which class' (i.e., whether skill or chance) 'a game belongs 'is a question of degree.'" Reliance was placed by counsel for the Crown on a passage in the judgment of Lord Russell C.J. in *Reg. v. Davies* (3), a passage frequently quoted in these cases. The passage is as follows: "But, further, 'it appears that the jury were asked whether the house was 'used for unlawful gaming, and whether the game of 'German 'Bank' as played there, was an unlawful game. These 'questions, however, are questions of law for the judge and 'not of fact for the jury, who must apply the facts to the 'definition of the law given by the judge; here there seems 'to have been no direction as to the law in the summing-up.'" In that case the real contest was whether or not four friends who sat down in a private house (the house of one of them) on one occasion only, and after playing whist, played a game of German Bank could be convicted of using the house or room for the purpose of unlawful gaming being carried on therein. Lord Russell emphatically stated that on that evidence, in his opinion, it was monstrous to say that the case fell at all within the mischief or within the provisions of the statute which was intended to prevent the user of the house as a gaming house. As was pointed out in *Jenks v. Turpin* (4) by Hawkins J., a person is not guilty of keeping a gaming house, i.e., using a house for unlawful gaming unless the house is one to which persons are invited habitually for the purposes of gaming. The view expressed by Lord Russell C.J. on this point in *Reg. v. Davies* (3) was sufficient to justify the quashing of the conviction, there being no evidence in that case that the premises were used for the purpose of unlawful gaming. The other passage quoted from his judgment, a judgment concurred in by Hawkins J., Grantham J., Wright J., and Collins J.,

(1) 15 Cr. App. Rep. 155.

(2) 84 L. J. (K. B.) 2022.

(3) [1897] 2 Q. B. 202.

(4) 13 Q. B. D. 516.

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was not necessary for decision in that case. However that may be, in our view, the concluding words of the passage quoted make it clear that it is for the jury to find the facts on a proper direction on the law from the judge, and that, if there are facts to find before a jury can return a verdict, it is for the jury and not for the judge to find those facts. In *Rex v. Hendrick* (1) Avory J., in commenting on *Morris v. Godfrey* (2), pointed out that the Divisional Court in that case upheld the decision of the magistrate (who was the judge of both law and fact) on his finding of the facts. The magistrate in that case had found that on the facts the game of progressive whist on the evidence before him was a game in which chance predominated over skill, which was equivalent to saying it was not a game of mere skill, and, therefore, in law was a game the playing of which in premises week by week throughout the winter season rendered the occupier of such premises guilty of unlawful gaming. For a judge to take on himself the duty of finding the facts, and, on the facts so found by him, to direct the jury that they must convict is to dictate the verdict to the jury instead of leaving the jury to find their own verdict on the facts as found by them after a proper direction on the law. In any criminal case the judge has, no doubt, a right and a duty to withdraw from a jury an issue on which there is no evidence, but, except in such a case, every question of fact on which there is evidence is within the province of the jury and it is for the jury to come to a conclusion on it after a proper direction from the judge. Similarly, a judge has a right and a duty to point out to a jury that the evidence before them is "all one way" and, if they accept the uncontradicted evidence, they cannot find a particular verdict. *Rex v. Larkin* (3) is an example of this where Oliver J. on the evidence given told the jury that they could not find a verdict of Not Guilty, but that it was a case of murder or manslaughter, and, even if they accepted the prisoner's evidence to the full, the verdict must be one of manslaughter. In *Rex v. Kirby* (4) it was contended on an appeal from a conviction for unlawful gaming (in an automatic machine case) that the learned recorder had usurped the functions of the jury in telling them in effect that they must convict. In that case the facts were, apparently, not in dispute, and the appeal failed, and in the judgment of the court delivered by Lord

(1) 15 Cr. App. Rep. 155.

(2) 28 T. L. R. 401.

(3) (1942) 29 Cr. App. Rep. 18.

(4) 20 Cr. App. Rep. 12.

Hewart C.J. there appears this passage: "In the present case the facts were all one way. In our opinion, therefore, there is no ground here for saying that there was no evidence upon which the jury might not properly convict, nor is there any ground for saying that the learned recorder failed adequately to explain the matter to the jury in his summing up or usurped to himself functions to be performed by the jury." In that case evidence was called to show that the game was a game of chance, and no evidence was called at the trial on behalf of the appellants. In *Rex v. O. K. Social and Whist Club, Ltd.* (1), the appellants were convicted before the recorder of Liverpool of keeping a common gaming house, the game in question being progressive whist in which, as Lord Hewart pointed out, the partners as well as the cards were shuffled, and it was argued for the appellants that the recorder adopted a wrong method in telling them that it was impossible for them to hold that whist as played in that club was a game of skill. All that the Court of Criminal Appeal decided in that case was in effect that, the evidence being all one way, the game involving as it did at every turn the element of chance and multiplying and confusing the element of chance by the progression of the partners throughout the evening, the recorder was not guilty of an error in law when he told the jury that on the evidence before them it was impossible for them to hold that progressive whist as played in the club was a game of skill. In *Rex v. Brennand* (2) the only evidence before the court was that the automatic machine in question in that case, known as the Little Stockbroker, was a game of chance, and as was said by Avory J. (3): "the persons who used this machine did not read the directions or study the dial, but dropped pennies into the machine and took their chance of something coming out," and "the description given to us seems to suggest that anyone who wanted to make a certainty of winning, would have occupied the machine for a great part of the day to the exclusion of all other people." In this case, again, the evidence was all one way, the court holding that there was no ground for complaint that any question of fact which was left open was not left for the determination of the jury. Similarly, in *Rex v. Salisbury* (4), the court again held that, where the evidence was all one way, no witness having

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(1) 21 Cr. App. Rep. 119.

(3) Ibid. 99.

(2) 22 Cr. App. Rep. 95.

(4) [1939] 1 All E. R. 250.

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been called for the appellants to controvert the evidence given by the prosecution that the game of "fascination" was one of chance, the learned chairman of the London sessions was right in holding as a matter of law that the game was unlawful, i.e., the element which constituted the unlawfulness of the game, that the game in fact was a game of chance, not being disputed. The court is, therefore, of opinion that, although it is for the judge, and for the judge alone, to decide whether, on given facts, a game is unlawful, it is for the jury to find whether or not the elements which go to make that game unlawful are proved, that is to say, in the case of a card game whether or not the game is one of mere skill.

With regard to the other point raised by Mr. Beyfus, namely, that the learned chairman applied the wrong test of unlawful gaming, we are of the following opinion. We have already pointed out that, although it is for the judge, as a matter of law, to define to the jury what is an unlawful game, it is for the jury to find the facts and to draw the inferences of fact which, when ascertained, constitute a game unlawful when played in premises habitually used for that purpose. In respect to a game of cards, the test was quite clearly laid down in 1884 by Hawkins J. in *Jenks v. Turpin* (1). We refer particularly to the following passage in the judgment in that case: "Since that statute" (namely, the Gaming Act, 1845) "the only games made unlawful by 33 Hen. 8, c. 9, "are games of dice or cards, whether such games were known "at the time of the passing of that statute or have been since "invented. All such games, if they are games of chance, or "games of chance and skill combined (which cannot be called "games of *mere* skill), are in my opinion clearly within the "meaning of the words unlawful games in" [the Gaming Houses Act, 1854]. "The language of s. 1 of " [the Gaming Act, 1845], "in referring to 33 Hen. 8, c. 9, and repealing only so much "of it as applies to games of skill is a strong indication of the "intention of the legislature that all the other games mentioned "in the statute of Hen. 8 were to continue to be treated as "unlawful in the sense in and to the extent to which they were "made unlawful by that statute, namely, unlawful if played "in a house kept for playing at them. The *unlawful* games "then, now are—ace of hearts, pharaoh, basset, hazard, "passage, roulette, every game of dice except backgammon,

"and every game of cards which is not a game of *mere* skill,
 "and, I incline to add, any other game of mere chance. Does
 "baccarat come within this category? The description of
 "the game given by Mr. Russell satisfies me that it does. It
 "is a game of cards. It is a game of chance; and though,
 "as in most other things, experience and judgment may
 "make one player or banker more successful than another,
 "it would be a perversion of words to say that it was in any
 "sense a game of mere skill. It is, therefore, in my opinion,
 "an unlawful game within the meaning of the statute."

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That decision has never been questioned. That test was applied by the Divisional Court in *Dalton v. Adelphi Club, Ltd.* (1). Lord Hewart C.J. in delivering the judgment of the court in that case, in which the question of the user of certain premises for the purpose of playing stud poker was under consideration, on a case stated by a metropolitan magistrate, said: "Whatever the degree of skill an experienced player
 "at stud poker may acquire, that game, as described in the
 "case, must always remain a game of chance, and, in the
 "language of Hawkins J., with respect to baccarat, it would be
 "a perversion of words to say that it was in any sense a game
 "of mere skill." The Lord Chief Justice pointed out that in any case the magistrate had not been asked to find that the game was one of mere skill. "Any such finding," he says, "would have been obviously absurd," the magistrate having merely expressed the opinion that on the evidence, the game of stud poker was a game of skill. The case was sent back to the magistrate with a direction to find that the charges against the respondents were proved. Bearing in mind that all games of cards are made unlawful by statute and that the Gaming Act, 1845, did not repeal specifically that part of the statute of 33 Hen. 8, which dealt with "carding," we are of opinion that the proper question for a jury, when dealing with a game of cards, is: Is this a game of skill, i.e., a game in which the element of chance is so slight as to render the game one which can properly be said to be a game of mere skill.

We were referred in argument to many of the decisions in the "automatic machine" cases. In *Fielding v. Turner* (2) the Divisional Court considered a case involving the use of an automatic machine. The working of this machine was thus described in the case: A person desiring to work the machine puts a penny in the slot and then pulls down a spring by means

(1) (1938) 160 L. T. 14.

(2) [1903] 1 K. B. 867.

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of a knob and then lets the knob go suddenly and the spring flies up and the penny is thus sent on its journey and may go into one of seven compartments. If it goes into either of two compartments, the penny is returned to the sender ; if it goes into one of four compartments, the penny is retained in the machine and the sender gets nothing for it. If the penny goes into the centre compartment—the bull's eye, as it is called—the sender receives from the machine a ticket entitling him to receive from the appellant two-penny's worth of sweets or it may be cigarettes or cigars. It was proved that on the day in question a number of boys and some men put pennies into the machine with varying fortunes, sometimes winning and more often losing. In cross-examination some of the boys who gave evidence admitted that there was some skill in working the machine and that a person who was accustomed to the game won as often as he lost. The appellant was convicted of unlawful gaming by the justices. On appeal, the court, consisting of Lord Alverstone C.J., Wills and Channell JJ., held that the conviction was right, and, in giving the judgment of the court, Lord Alverstone C.J. said (1) : "It was argued before us that the conviction was wrong on "the ground that there was no evidence of unlawful gaming "within the section. The first ground on which this contention "was founded was that, if a game at all, the use of the "automatic machine in question constituted a game of skill. "We are clearly of opinion that this contention cannot be "maintained. In the proper sense of the word, skill has no "effect upon the act done by the person who puts the penny "into the slot. No doubt continuous practice with the same "machine might enable a person to acquire knowledge as to "the strength of the particular spring, and thereby enable him "to be more successful in making the penny fall into the centre "compartment than in the case of a person who had not the "same practice of the machine. On the first, and probably "on many occasions it is a pure question of chance into which "compartment the penny will fall ; no aim can be taken, and "it is not unimportant to observe, in connexion with another "part of the case, that there are four compartments into which "it can fall with no return to the person inserting it, as against "one into which if the penny falls it will enable the person "inserting it to receive a ticket of the nominal value of 2d." From this it would appear that, although there might be a

(1) [1903] 1 K. B. 867, 871.

certain amount of skill acquired by practice, the game was one of chance and the court decided that that game was not a game of skill. In *Pessers, Moody, Wraith & Gurr, Ltd. v. Catt* (1), the defendant sought to escape from his obligation to pay rent which he had agreed to pay to the plaintiffs for the hire of certain automatic machines on the ground that he was induced to enter into the agreement by a representation and a warranty that the defendant might lawfully invite the public to use the machines, and that such user of the machines constituted a game of skill, and, further, in the alternative, that the agreement was null and void in that the machines were let to him to be used in various places for the purpose of unlawful gaming and wagering. Scrutton J. held the game was one of skill (a conclusion previously come to by Eve J. on a motion for an interlocutory injunction), and gave judgment for the plaintiffs. That decision was upheld on appeal when Vaughan Williams L.J. said: "There is, I suppose, some skill in this game. Both Eve J. and Scrutton J. thought so. I think the amount of skill ought to be taken into consideration, even if it were what I should call a scintilla of skill, but in this case I think there was some skill, and I should say that there was more than a scintilla of skill. I shall not trouble myself with any definitions." Kennedy L.J. said, after referring to *Fielding v. Turner* (2) and *Thompson v. Mason* (3): "It seems to me that in this case there is what I may call a governing element of skill in the use of the cup which can, wherever the ball falls, skilfully used, catch that ball. Of course, the degree of skill, and therefore the success, will depend to some extent upon practice, and with practice to a person with a good eye who is using the movable bar to which the cup is attached, it would be perfectly possible, I should imagine, if he were a skilful person, to catch it every time. Therefore, the test as to success or failure seems to me in this case to be one of skill and not of chance. That is the dominant element, and, being so, I think the judgment which has been pronounced below, and is in accordance with that of Eve J., was right, and that this appeal should be dismissed." The learned lord justice applied the test of the dominant factor and not the test of mere skill. In subsequent automatic machine cases, the test there suggested by Kennedy L.J. has been adopted. Since

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(1) 77 J. P. 429.

(3) (1904) 68 J. P. 270.

(2) [1903] 1 K. B. 867.

C. C. A. 1913 the courts, in automatic machine cases, have taken as a test, not whether the game is one of mere skill, but whether or not the proportion of skill to chance is such as to establish that skill is the dominant or governing factor in the game.

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 TOMPSON. That test has never been applied to games of cards, and, in our opinion, rightly so, because, as was pointed out in *Jenks v. Turpin* (1) by Hawkins J., there is a distinction between card games, which by statute are unlawful unless they are games of mere skill, and such games as those played with automatic machines which are not unlawful unless they are games of mere chance and become mere instruments of gaming. It appears, therefore, that in the present case, the learned chairman applied the right test, namely: Is this game a game of mere skill? He said: "I am quite satisfied that poker is not a "game of mere skill and is unlawful." The error which he made was, in our opinion, in not leaving to the jury the question whether, on the evidence called, the game was a game of mere skill, and telling them that, if they found it was, they should acquit, and, if not, to convict. On that ground we think that these convictions must be quashed.

Convictions quashed.

Solicitors for appellants: *Claude Hornby, Dods & Co.*

Solicitor for prosecution: *Solicitor for Metropolitan Police.*

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(1) 13 Q. B. D. 505.

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May 26, 27; *Master and servant—Common employment—Servant a child—Applicability of doctrine.*

June 10.

The true rule of the doctrine of common employment is that a worker, paid or unpaid, who has agreed to serve a master, is to be deemed to have undertaken the risk of the negligence of those working with him in that service, provided that neither (i.) the terms of the express contract, if any, nor (ii.) the facts of the case, exclude the possibility of implying such an undertaking. The fact that the worker is a child who is incapable of taking care of himself and is in need of protection against the dangers attendant on his own childish propensities is inconsistent with such a term being implied in the contract of service and excludes the possibility of implying the undertaking. Even if the undertaking can be implied in the contract, it is necessary to consider whether the contract as a whole was for the child's benefit.

APPEAL from Croom-Johnson J.

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The plaintiff was a boy aged ten years, and the defendant was a farmer, whose son, Francis Hamlyn, aged 22, managed the farm for him with full authority to employ labour. On November 20, 1940, the plaintiff visited the farm to fetch some milk to which his father was entitled. Francis Hamlyn was about to thresh a stack of corn, and, thinking that the boy was likely to get into mischief with the machinery if left to himself, he invited him to go to the top of the stack to pass down to him on a platform of the threshing machine sheaves of corn for him to put into the machine. After some time Hamlyn decided to discontinue, and he told the plaintiff to get down from the stack by a ladder while he went and switched off the tractor which was working the machine. While his back was turned, the plaintiff stepped off the stack on to the platform from which Hamlyn had been feeding the threshing machine, and, seeing a sheaf of corn lying there, he pushed it into the machine with his foot which was drawn into the aperture with the result that his leg had to be amputated. In an action by the plaintiff against the defendant for damages for personal injuries, alleging negligence on the part of Francis Hamlyn, the defendant raised the defence (inter alia) that the plaintiff was in common employment with Francis Hamlyn, and that, consequently, he (the defendant) was not liable. Croom-Johnson J. found that Francis Hamlyn was negligent. He also found that the plaintiff was reasonably intelligent, but knew nothing of the danger of the machine and was not of such an age as to appreciate the danger even if it had been pointed out to him; that he was not able to understand that, by helping in the threshing, he was making any contract or involving himself in any responsibility whatsoever; and that he was an invitee and not a trespasser, although he was not injured in the place to which he had been invited, namely, the stack, but on the platform, whither he had been lured by the temptation to put the sheaf into the machine. Accordingly, Croom-Johnson J. held that the doctrine of common employment did not apply, and that the defendant was liable, and he awarded the plaintiff 2000*l.* damages. The defendant appealed.

Elizabeth Kathleen Lane for the defendant. Even if Francis Hamlyn was guilty of negligence for which the defendant would otherwise be responsible the plaintiff cannot

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recover because he was in common employment with Hamlyn. The plaintiff was a farm labourer's son and had previously assisted on the stack, and the nature of the danger to which his own negligence or that of Hamlyn might expose him would be clear to him. The plaintiff was a trespassing volunteer, of whose presence the defendant was ignorant, and, therefore, he cannot complain of the negligence of the defendant's servant: per Scrutton L.J. in *Hayward v. Drury Lane Theatre* (1). There was no allurement, for all cases of allurement imply invitation, and Croom-Johnson J. found that there was no invitation to go on the platform. The fact that the plaintiff was an infant makes no difference to the application of the doctrine of common employment: *Cribb v. Kynoch, Ltd.* (2). [*Degg v. Midland Ry. Co.* (3) was also referred to.]

Lancelot Fletcher for the plaintiff. The doctrine of common employment does not apply. The plaintiff was invited only to go on the stack to throw down sheaves, and he was a volunteer when he went on the platform and thrust the sheaf into the threshing machine. Francis Hamlyn brought the plaintiff to a place where, as a young boy, he would be exposed to the temptation of doing a dangerous thing. The doctrine of common employment is based on an implied acceptance by the workman of the risk of the negligence of fellow-employees, and that implication cannot be made in the case of this child of ten.

E. K. Lane replied.

Cur. adv. vult.

June 10. SCOTT L.J. It is impossible to state the doctrine of common employment in this case in terms which do not contradict the primary duty of Francis Hamlyn to take reasonable care of the plaintiff. The breach of that duty was the direct cause of the accident. I abstain from discussing the authorities as I know that du Parc L.J. is going to do so. I have read his judgment and I agree with his analysis of the cases. I would add that I little like the doctrine of common employment as applied to adults, and it seems fundamentally inapplicable to the case of young volunteers such as the present plaintiff.

(1) [1917] 2 K. B. 899, 913.

(2) [1907] 2 K. B. 548.

(3) (1857) 1 H. & N. 773.

MACKINNON L.J. I have read the judgment about to be delivered by du Parc L.J., and, in view of his examination of the rule of common employment, I do not think that I need repeat what he has said so sufficiently.

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DU PARC L.J. read the following judgment. Negligence having been established against the defendant's son, it follows that the defendant is liable for that negligence unless the defendant is entitled to rely on the doctrine of common employment. That doctrine, it is now clear, is based on an implied undertaking by the workman. "It can never be applicable when there is no relation between the parties from which such an undertaking can be implied": see per Lord Herschell in *Johnson v. Lindsay & Co.* (1), and *Radcliffe v. Ribble Motor Services, Ltd.*, especially per Lord Atkin (2), and per Lord Wright (3). *Degg v. Midland Ry. Co.* (4), on which the defendant's counsel relied, has been much discussed. It was approved by the Exchequer Chamber in *Potter v. Faulkner* (5), and is binding on us. These decisions must, however, be read in the light of the judgments delivered in this court in *Hayward v. Drury Lane Theatre* (6). They cannot be held to rest on the doctrine of common employment since in neither of them was there any contractual relation between the parties. The same must be said, I think, of *Bass v. Hendon U. D. C.* (7). The true ground of all these decisions seems to be that the volunteer was a trespasser in the sense that he officiously and illegally meddled with what was no concern of his: see the judgments of Scrutton L.J. and Neville J. in *Hayward v. Drury Lane Theatre* (8). This, at any rate, is "a ground upon which both cases can be supported": per Neville J. (8). The late Sir Frederick Pollock regarded them as illustrations of the principle *volenti non fit injuria*: Pollock on Torts, 14th ed., p. 84. Professor Winfield suggests that cases of this class may be explained on the ground that the servant who invites the help of a volunteer is usually acting outside the course of his employment when he does so: Winfield on Torts, 2nd ed., p. 147. It will depend on the particular facts of each case as it arises whether all or any of these grounds of defence can be pleaded successfully.

(1) [1891] A. C. 371, 378.

(5) (1861) 1 B. & S. 800.

(2) [1939] A. C. 215, 227.

(6) [1917] 2 K. B. 899.

(3) Ibid. 247.

(7) (1912) 28 T. L. R. 317.

(4) 1 H. & N. 773.

(8) [1917] 2 K. B. 907, 915, 917.

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None of them, in my opinion, gives support to the case of the present defendant. It was, indeed, argued that the infant plaintiff was a trespasser. The truth is, however, that he was an invitee, at any rate down to the moment when the threshing machine proved an irresistible temptation. If the boy strayed beyond the strict limit imposed by the terms of the invitation, it was because of the failure of the defendant's agent to guard him against a dangerous allurement, and, if he can properly be called a trespasser at all, the trespass was a natural and probable result of the negligence of the defendant's agent. A defendant who has lured an invitee into a forbidden area cannot thereafter treat him as a trespasser.

I am of opinion, therefore, that the decision in *Degg v. Midland Ry. Co.* (1), and the cases in which it has been followed give no assistance to the defendant. It has been said, however, that in all cases of this kind the plaintiff is in a dilemma. If he was engaged, or requested to help, on the authority of the master, then he becomes a fellow-servant with the other servants of the master. If, on the other hand, he was engaged to help without any authority at all from the master, then he is, in legal strictness, a trespasser: see the judgments of McCardie J. in *Heasmer v. Pickfords, Ltd.* (2), and of Atkinson J. in *Bromiley v. Collins* (3). In many and probably in most cases of this kind, the plaintiff can find no escape from this dilemma, but in the case before us the plaintiff is, in my opinion, in no such difficulty. It is, I think, true to say that there was here a contractual relation between the infant plaintiff and the defendant, whose son had the defendant's authority to invite him to work. In *Degg's* case (1), Bramwell B., delivering the judgment of the court, met the argument that there could be no undertaking by the volunteer because there was no agreement with the proposition that "it is as competent for a man to agree, and as reasonable to hold that he does agree, that if allowed to assist in the work, though not paid, he will take care of himself from the negligence of his fellow-workmen, as it would be if he were paid for his services." The criticisms in *Hayward's* case (4) of this ratio decidendi leave it untouched as a statement of the general principle to be applied when the volunteer has been invited to work by, or with the authority of, the master. That general principle is, however, subject to an important

(1) 1 H. & N. 773, 780.

(3) [1936] 2 All E. R. 1061.

(2) (1920) 36 T. L. R. 818.

(4) [1917] 2 K. B. 915.

qualification. The true rule is that a worker, paid or unpaid, who has agreed to serve a master, is to be deemed to have undertaken the risk of the negligence of those working with him in that service, provided that neither (i.) the terms of the express contract, nor (ii.) the facts of the case, exclude the possibility of implying such an undertaking. As Lord Wright said in *Radcliffe v. Ribble Motor Services, Ltd.* (1): "It is easy to generalize and ignore limits which arise on the facts of the case. It is difficult sometimes to fit a factual qualification on a fictitious contract." It follows, I think, from the principles enunciated in the House of Lords in *Radcliffe's* case (1), and particularly from what was said by Lord Wright, that the law will not import a fictitious undertaking into the contract unless the fiction can be fitted into the framework of the facts. It is true that the House of Lords was dealing with a case in which the fictitious undertaking was only qualified by the facts, and not excluded as being wholly inconsistent with them, but on principle it seems to me to be plain that since the fictitious undertaking must, where necessary, be so moulded as to fit the facts, it must be wholly excluded in a case where it cannot by any process of adaptation be made to fit the facts at all.

In the present case, then, the question is whether the infant plaintiff, a child who was incapable of taking care of himself and in need of protection against the dangers attendant on his own childish propensities, can be taken to have agreed that, if he were allowed to work for the defendant, he would, in the phrase used by Bramwell B. in *Degg's* case (2) "take care of himself from the negligence of his fellow workmen"; or, as it is sometimes put, bear the risks arising from such negligence. There is, as it seems to me, only one possible answer to this question, and the absurdity of the suggestion that such an undertaking can be implied is the more apparent when it is seen that the negligence complained of is an omission to guard the boy against a tempting danger. The facts exclude the possibility of such a term in the agreement. The fiction cannot be reconciled with the facts.

Counsel for the defendant rightly called our attention to *Cribb v. Kynoch, Ltd.* (3), a decision of a Divisional Court which was approved by this court in *Young v. Hoffmann Manufacturing Co., Ltd.* (4). Those cases decided that, under the doctrine

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(1) [1939] A. C. 215, 249.

(3) [1907] 2 K. B. 548.

(2) 1 H. & N. 773, 780.

(4) [1907] 2 K. B. 646.

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of common employment, an infant workman is, or may be, in no better position than an adult, and that a master who has delegated to a competent servant the duty of instructing an inexperienced workman in the use of machinery is not responsible for that servant's negligence. It may well be right to say that the mere fact that a workman is under twenty-one years of age is insufficient to deprive the employer of the defence of common employment. The position of a child of tender years, who, to the knowledge of the defendant's servant and agent could not safely be trusted near dangerous machinery at all, is in a different category from that of a young workman, capable of using intelligence and skill. In *Young v. Hoffman Manufacturing Co., Ltd.*, Lord Cozens-Hardy M.R. said (1): "There can be no legal difficulty in implying as one of the terms of the contract a stipulation which, if the contract were expressed in writing, would be free from objection." In the present case, if the contract between the parties had been written out at length, any attempt to embody in it the undertaking on which the defence of common employment is founded would have revealed the incongruity of that undertaking with the context and with the facts.

It must be added that, even if the necessary undertaking could have been implied in the contract, the defendant's difficulties would not be at an end. As MacKinnon L.J. pointed out during the argument, it would then have been the duty of the court to consider whether the contract as a whole was for the infant's benefit. In *Young v. Hoffmann Manufacturing Co., Ltd.* (1), the court had no difficulty in deciding that an ordinary contract of service in which the undertaking was to be implied was beneficial to the infant: see the judgment of Lord Cozens-Hardy M.R. (1). This is a very different case, and it would be difficult, and, I think, impossible, to maintain the proposition that a contract by which a child of ten, working without reward, agreed to bear the risks of a fellow-worker's negligence, was beneficial to the child.

For these reasons I am of opinion that the defence of common employment is not available to the defendant. Croom-Johnson J. arrived at the same conclusion, mainly on the ground that at the moment of time when the defendant's son was guilty of negligence, he and the infant plaintiff had ceased to be fellow servants. I find some difficulty in accepting this view. It is true that before the happening of the accident the work

of threshing had been stopped for the time being and that the defendant's son had told the plaintiff to get down, but I doubt whether it can be said that the plaintiff's engagement as a voluntary worker terminated immediately on the giving of that order and before he had obeyed the order and reached the level of the ground. I am glad to be able to found my judgment on broader considerations rather than on so nice a distinction. In my opinion, the appeal should be dismissed.

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Appeal dismissed.

Solicitors for defendant: *Routh, Stacey, Hancock & Willis, for Knocker & Foskett, Sevenoaks.*

Solicitors for plaintiff: *S. Thornhill Tracey, for F. B. Jevons & Riley, Tonbridge.*

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June 1, 2, 3;
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Revenue—Income tax—Loan secured by notes—Notes issued at discount—Redemption at premium—Assessability of discount and premium—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), sch. D, case III., r. 1 (b), cases IV., V.

An English company formed a Finnish company to which it advanced 319,600*l.* By an agreement, dated November 11, 1933, the Finnish company agreed to issue 340,000*l.* in notes of 500*l.* at a discount of 6 per cent. in respect of the sum owing to the English company. Interest on the notes was payable at one per cent. above the lowest discount rate of the Bank of Finland during each year. The notes were to be paid off, as to one hundred notes on November 15, 1933, and as to twenty-nine notes on April 6 of each following year, and were to bear a premium of twenty per cent. if the Finnish company's profits permitted it. The interest payable on the notes, the discount and the premium together represented a return of about seven and three-quarters per cent. on the amount outstanding. For the years from 1933 to 1940 inclusive the proper number of notes were duly paid off at a premium:—

Held (reversing the decision of Macnaghten J.), that the discount and premium on the notes were capital payments, and, therefore, not subject to income tax.

Propositions laid down to guide the court in deciding whether or not the discount at which a loan is made and the premium at which it is repayable are of the nature of interest or capital.

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Peter Dixon & Son, Ltd. (hereinafter called "the English company"), was incorporated in the United Kingdom and manufactured newsprint. In 1926 the English company decided to make better arrangements for its supply of wood pulp and formed a Finnish company in Finland called O/Y. Toppila (hereinafter called "the Finnish company"). A factory was erected and began to operate in 1931. The Finnish company was controlled in Finland by a Finnish board, all the shareholders being nominees of the English company. Before 1933 the English company had made advances to the Finnish company amounting to 319,600*l.*, and on November 11, 1933, an agreement was entered into between the two companies for regulating, securing and providing for repayment of this sum. Clause 4 of the agreement provided that the Finnish company should give notes to the English company to the amount of 340,000*l.* in six hundred and eighty notes ranking *pari passu* and each for 500*l.* Interest was to be paid on the amount outstanding on these notes calculated from January 1, 1933, at the rate of one per cent. above the lowest discount rate of the Bank of Finland during each year, but in no case higher than ten per cent. per annum. The notes were to be repaid, as to one hundred notes on November 15, 1933, and as to twenty-nine notes on April 6 in each of the following years. Each note was to be redeemed at a premium of twenty per cent. if the net profits of the Finnish company for the financial year before the note became due for redemption amounted to not less than the total premiums payable on the notes to be redeemed. The notes were issued at ninety-four per cent., that is, at a discount of six per cent., making the total consideration 319,600*l.* The first one hundred notes were repaid four days after the agreement, and up to April 6, 1935, a further one hundred and forty-five notes were repaid in blocks of twenty-nine notes at a premium of twenty per cent. and the money remitted in sterling to the United Kingdom. The secretary of the English company (whose evidence was accepted by the Special Commissioners) said that the English company had always had in mind the element of risk which might arise through trouble between Finland and Russia. On the repayment of each of the notes the premium of twenty per cent. and the discount of six per cent. were carried to a surplus reserve account in the books of the English company. The interest, discount and premiums taken together represented

a return of about seven and three-quarters per cent. on the amount outstanding.

At a meeting of the Special Commissioners on September 29, 1941, the English company appealed against assessments made on them under sch. D to the Income Tax Act, 1918, as follows:—for the years 1933/1934 to 1939/1940 inclusive, 16,968*l.*, 21,189*l.*, 20,867*l.*, 19,918*l.*, 18,901*l.*, 17,929*l.* and 16,868*l.* respectively. One of the questions at issue was whether the discount and premium received on the notes were annual profits or gains in respect of which the English company was liable to assessment under case IV. or case V. of sch. D. On behalf of the Inspector of Taxes it was contended (i.) that the notes were securities within the meaning of case IV. of sch. D; (ii.) that the discount of six per cent. and the premium of twenty per cent. on the notes were income arising from securities out of the United Kingdom assessable under case IV.; and (iii.) alternatively, that, if the notes were not securities, they were possessions out of the United Kingdom, and the amount of the premium and discount received in the United Kingdom was assessable under case V. The English company contended that the discount and the premium were not annual profits or gains liable to assessment under any case of sch. D, but formed part of a capital transaction. The Special Commissioners held that the notes were not securities within the meaning of case IV., and that the six per cent. discount and twenty per cent. premium were not annual profits or gains liable to assessment under any case of sch. D, but were capital sums. They, therefore, discharged the assessments. On appeal Macnaghten J. reversed the decision of the commissioners, holding that the six per cent. discount and twenty per cent. premium were profits or gains liable to assessment. The English company appealed.

Burrows K.C. and *Scrimgeour* for the English company.

Sir David Maxwell Fyfe S.-G. and *R. P. Hills* for the Crown.

Cur. adv. vult.

July 8. LORD GREENE M.R. read the following judgment. It is sometimes said that the question whether a receipt is to be regarded as capital or as income is to be answered by the terms of the contract as properly interpreted in the light of all admissible extrinsic evidence. In some cases

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this is, no doubt, so. Examples are to be found in two cases which were cited to us. In a Scottish case, *Inland Revenue v. Thomas Nelson & Sons, Ltd.* (1), a loan was made to an Indian company repayable in ten years or earlier on the happening of certain specified events with a power to the company to repay one-tenth of the principal on three months' notice, the rate of interest being three per cent. The agreement provided (and this is the important matter) that on payment of the principal sums or any part thereof there should be paid a premium varying with the date on which such principal sums or any part thereof should become payable. From this it appears that the amount to be paid by way of premium must have been calculated by reference, not to any element of capital risk, but to the period of the loan, whatever it might turn out to be, a circumstance which prima facie, at any rate, stamped the premium with a revenue character. The Lord President in his judgment placed great reliance on the fact that the rate of interest (three per cent.) was for a loan of that character a remarkably low one. He also pointed out that under the power given to the borrower to make yearly repayments, if it had been exercised the lenders would have received in the form of interest plus premium a return varying between five and something over five and a half per cent. and this he said could only be regarded as a reasonable return on the capital lent. He also pointed out that there was no resemblance between the case before him and that of a debenture issued at a discount. The case before him turned on "the specialties of the contract" and forms a good example of a case where the contract itself gives the answer to the question. The other example is *Ruskin Investments, Ltd. v. Copeman* (2), a recent decision of this court. There the argument on behalf of the taxpayer was that the transaction was one of purchase and not of loan, and the judgments of Scott L.J. and myself are devoted to an examination of this question. It was not seriously suggested that, if that were not so, the profit in question would be anything but income. The loan was a loan at interest and the assignment of the ground rents was to operate as satisfaction of both principal and interest. In these circumstances it would have required some courage to argue that the value of the ground rents ought not to be treated as being made up of the principal advanced plus interest. This again was a case where the answer to this

(1) 1938 S. C. 816.

(2) [1943] 1 All E. R. 378.

particular question was to be found in the contract itself.

In many cases, however, mere interpretation of the contract leads nowhere. If A. lends B. 100*l.* on the terms that B. will pay him 110*l.* at the expiration of two years, interpretation of the contract tells us that B.'s obligation is to make this payment. It tells us nothing more. The contract does not explain the nature of the 10*l.*, yet who could doubt that the 10*l.* represented interest for the two years? The justification for reaching this conclusion may well be that, as the transaction is obviously a commercial one, the lender must be presumed to have acted on ordinary commercial lines and to have stipulated for interest on his money. In the case supposed, the 10*l.*, if regarded as interest, is obviously interest at a reasonable commercial rate, a circumstance which helps to stamp it as interest. In *Lord Howard de Walden v. Inland Revenue Commissioners* (1), the taxpayer became entitled to receive sets of promissory notes payable without interest at three-monthly intervals. The consideration moving from the taxpayer was an amount which represented the present value of the promissory notes calculated in the case of one set of notes on a four per cent. basis and in the case of the other sets at a rate approximating to four per cent. Wrottesley J. pointed out that the documents threw no light on the problem whether or not the difference between the present value and the nominal amounts of the notes represented capital or income. Nor did he find any assistance in the surrounding circumstances. He rejected the view that the taxpayer had purchased an annuity (a view which was not pressed by the Crown) and held that he had stipulated for the return of his capital. This at once stamped the transaction as one of loan, and on that basis it does not seem to have been seriously argued that the difference between the present and the nominal value of the notes ought not to be regarded as interest. It is to be noted (1.) that the contracts did not in terms provide for payment of interest (2.) that four per cent. was a reasonable commercial rate. These facts led really as a matter of common sense to the inference that the four per cent. was interest.

A rather different case is that of a moneylender who stipulates for payment by instalments of a sum very much larger than that which he lends. From a business point of view, the excess, one would have thought, is referable largely, if not mainly, to the capital risk. So long as the moneylender

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is carrying on his business this is immaterial since he will be assessed under case I. of sch. D. It is part of his business to take capital risks, but in *Bennett v. Ogston* (1) the moneylender had died and the question arose in relation to instalments collected by his administrator. The substantial argument for the administrator was that, as the moneylender had been taxed under case I., the assessment for the last year of his life must be taken as covering the amounts got in by his administrator. Once this argument was rejected (as Rowlatt J. rejected it) it does not seem to have been seriously argued that the difference between the amount of the loan and the amount of the instalments did not represent interest. As Rowlatt J. says (2): "Each of these instalments is found in the case to contain principal and interest and we know, of course, that it is so, and we are familiar with the way in which these instalments are broken up into principal and interest." On this basis the insurance against capital risk was provided for by means of a high rate of interest, and, where this is the case, interest it is and not capital. In saying that the case was one of interest Rowlatt J. apparently based himself on the well-known practice of moneylenders, and if the deceased had been alive he would, no doubt, have admitted that he fixed the amount of instalments by reference to an interest table, a circumstance which would be sufficient to stamp the whole excess as interest. Moreover, under s. 8 of the Moneylenders Act, 1927, a moneylender is bound to supply to the borrower a signed statement showing the amount of principal and the rate per cent. per annum of interest charged. In such a statement the excess would necessarily appear as interest.

The position is more complicated when A. lends 100*l.* to B. at a reasonable commercial rate of interest and stipulates for payment of 120*l.* at the maturity of the loan. In such a case it may well be that A. requires payment of the 20*l.* as compensation for the capital risk, or it may merely be deferred interest. If it be proved that the former was the case by evidence of what took place during the negotiations, it is difficult to see on what principle the 20*l.* ought to be treated as income. In the absence of such proof, what inference ought to be drawn? Something may, perhaps, depend on the length of time for which the money is lent. If the period is short, it is, perhaps, easier to treat the 20*l.* as deferred

(1) (1930) 15 Tax Cas. 374.

(2) Ibid. 378.

interest. The longer the period the greater the element of risk, and, if it was (say) ten years, the probability that the 20*l.* was not intended to be deferred interest would seem to be greater. A good example of the difficulty is to be found in the contracts of loan which used to be made on a gold basis when the currency had left or was expected to leave the gold standard. In such contracts the amount to be repaid was fixed by reference to the price of gold ruling at the repayment date, and if the currency depreciated in terms of gold there was a corresponding increase in the amount of sterling to be repaid at the maturity of the loan. It could scarcely be suggested that this excess ought to be treated as income when the whole object of the contract was to ensure that the lender should not suffer a capital loss due to the depreciation of the currency.

I refer to these problems not to attempt to solve them but to show that there can be no general rule that any sum which a lender receives over and above the amount which he lends ought to be treated as income. Each case must, in my opinion, depend on its own facts, and evidence de hors the contract must always be admissible to explain what the contract itself usually disregards, namely, the quality which ought to be attributed to the sum in question.

I will now consider the case of an ordinary issue of debentures by a limited company. If the credit of the company is good and the security an ample one, the issue can be made at par at a normal reasonable rate of interest. If the company's credit and the security offered are exceptionally good, the issue can be made at a premium. In such a case the calculation of the rate of interest which the subscriber will receive on the capital which he invests is a simple matter. It will be less than the nominal rate, but this does not entitle the subscriber to avoid taxation on the difference between the nominal rate and the actual rate. He is taxed on what he, in fact, receives. The premium which he pays is capital. He pays it because the security which he is getting is a particularly good one. Here the excellence of the security is expressed in terms of capital. Such a company, however, may prefer to issue its debentures at par, but at a lower rate of interest. Here the excellence of the security is expressed in terms of interest. The subscriber receives less interest, but does not pay a premium. Actuarially the result is the same in both cases, but the subscriber pays less tax in the latter case than

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he does in the former because his income is less. Now let me take the opposite case where the credit of the company and the security which it offers are not such as to enable it to offer its debentures at par at a normal rate of interest applicable to sound securities. The object of the company is to make its issue attractive and various alternatives are open to it. It may make the issue at par, but give a high rate of interest. Here the defect in the security is expressed in terms of interest. The whole of the interest is unquestionably income and is taxable as such although the high rate of interest is in part attributable to the capital risk. Another course which the company may take, and for commercial reasons probably will take, is to fix the rate of interest at a more normal level and make the issue at a discount, or it may make the issue at par and offer a premium on redemption, or it may combine both methods. Here the defect in the security is expressed in terms of capital. I venture to think that no business man would regard the discount or the premium as anything but capital matters. In each case the result is the same—the subscriber is paying for a more or less hazardous investment less than the figure at which it is to be redeemed and in exchange has to be content with a lower rate of interest. Another way of making good the defect in the security would be for the company to take out a guarantee policy—a practice which was common in the days of the Law Guarantee Trust and Accident Society of unhappy memory. In such a case the issue might be at par. The subscriber would be paying more for a safer investment than he would have paid if the guarantee policy had not been taken out. No one would suggest that the premiums paid by the company were part of the subscriber's income. Yet the policy would be playing exactly the same part as would have been played by a reduction in the issue price, or the offer of a premium on redemption, or a combination of the two. The amount by which the issue price falls short of par or the redemption price exceeds par can, of course (as has been done in the present case), be reduced to terms of income if anyone chooses to make the calculation, and this is often done by a stockbroker advising a client, particularly when the redemption date is drawing near, but this does not mean that these amounts are income. If they were income and taxable as such when received on redemption, it would appear to follow that in the case of a debenture issued at a premium and redeemable at par the amount of the premium

ought to be treated as an income loss. A premium on redemption and a premium on issue are in their nature precisely the same and come into existence for the same reason, namely, the desire to express in the former case the greatness, in the latter the smallness, of the risk in terms of capital rather than in terms of interest.

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I have for simplicity considered only the case where the variations in issue price and rates of interest are due only to differences in the security offered. This, of course, is not necessarily always the case. The precise terms of an issue may be affected by a variety of other considerations, the taste of the market, the terms of previous issues by the company, the political or international situation, the expectation of changes in money rates, the instability of the currency, and so on, but these matters do not affect the principle. It is perfectly true that a company may be able to obtain subscribers by issuing debentures at par at a high rate of interest just as well as it can by issuing them at a lower rate of interest below par or with a premium on redemption. The two methods are, however, essentially different, although actuarially they will normally produce the same result, but for income tax purposes the result is, I think, different according as the company chooses the one method rather than the other. The Crown is, in my opinion, bound by the company's choice and cannot go behind it. The inland revenue authorities have never sought to tax the amount by which the redemption price of debentures exceeds the issue price. We were informed by the Solicitor-General that these amounts are regarded, not as income, but as capital sums which the company bears in consideration of the risk attaching to the investment which is borne by the investor. In my opinion, this view is undoubtedly correct. In passing, I may point out that the reason given by the then Solicitor-General in *Wilson v. Mannoeh* (1) for not claiming tax on discounts or premiums in the case of debentures was quite different from that given by the Solicitor-General in the present case.

I can find no ground for distinguishing the present case from that of an ordinary issue of debentures by a trading company. If at the date of the agreement the English company had lent to the Finnish company a sum of 319,600*l.* to be secured by an issue of notes at ninety-four repayable over twenty years at one hundred and twenty and bearing interest

(1) (1937) 21 Tax Cas. 178.

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at a rate fixed by reference to bank rate in the usual way, the revenue authorities would not have claimed tax on the discount or the premium. The element of capital risk was quite obviously a serious one and the parties were entitled to express it in the form of capital rather than in the form of interest if they bona fide so chose. It is said, however, that there is a difference between the case of a security issued for a present loan and that of a security issued to cover an existing loan. This argument found favour with Macnaghten J., but with all respect to him I cannot follow it. The parties to the transaction, faced with an existing debt which the Finnish company was obviously not in a position to repay there and then, did what in effect amounted to writing down the capital value of the debt which by the terms of the agreement was now to be repaid over a long period of years bearing interest in the meantime at a normal commercial rate. I can see no difference between writing down the capital value of an existing debt and writing down the capital value of a new debt which is what is done where a company makes an ordinary issue of debentures at a discount or repayable at a premium. Moreover, it is quite common for a company to issue debentures as security for an existing loan. This is often done in the case of a company's bankers who call for security, and also not infrequently under schemes of arrangement when debentures are issued to existing creditors of the company. In such cases circumstances may well call for a writing down of the value of the debts.

An additional argument was presented on behalf of the Crown to the effect that the difference between the price at which the notes were issued and the redemption price, or, at any rate, the difference between the issue price and the nominal par value of the notes, was income from "discounts" within the meaning of para. (b) of r. 1 to case III., but, in my opinion, the word "discounts" in that paragraph does not cover such a case as the present. I agree with what was said by Rowlatt J. in *National Provident Institution v. Brown* (1): "It is clear," he said, "that it is not every difference in amount "between a sum payable in future and the same sum represented by cash down which is an annual profit or gain by "way of discount, even though popularly the word 'discount' "may be used to describe it." It was conceded (and, in my opinion, rightly) that in the case of a debenture the difference

between issue price and redemption price when received by the holder is not income from "discounts" within the meaning of the paragraph. It is impossible to suppose that the legislature intended to include under the one word "discounts" two such entirely different commercial transactions as the discounting of a bill of exchange or a Treasury bill (both of which normally are short-dated and carry no interest) and a subscription for debentures issued at a discount. The issue of debentures or other obligation by companies was unknown in 1805 when "profits on discounts" were for the first time expressly subjected to income tax (45 Geo. 3, c. 49, s. 93, sch. D, case III., r. 2). In *National Provident Institution v. Brown* (1), Lord Sumner says that there is no restriction of the word "discount" in the statutes to transactions in use in the year 1842—he might have said 1805—and that the rule relates to profits on all discounts from whomsoever made. This observation does not, however, throw much light on the question whether any particular transaction is one of "discounts" within the meaning of the rule. If the case of the debenture fell under the word "discount" it would follow from the *National Provident* case (1) that profits realized by selling debentures on the market would be taxable as income as well as those made by an original subscriber who holds his debenture until maturity. The storm which would be aroused in the city of London if this were found to be the law is, perhaps, the best proof that it cannot be the law, since it shows at once the fundamental difference from the business point of view between the case of the debenture and the case of the discounted bill. It is conceded that the word would not cover the "discount" in the case of a debenture issued "at a discount," and, as I have already said, for present purposes I can see no difference between that case and this. In the discounting of bills of exchange, Exchequer bills, etc., the discount is the reward, and, in the normal case (since such bills do not as a rule carry interest), the only reward, which the person discounting the bill obtains for his money. Lord Sumner pointed out in the *National Provident* case (2) that in the case of a "discount" two economic elements are present, "one the value of the usufruct forgone, as measured by interim interest, and the other the risk that the money will never be repaid at all." He says, further: "there is nothing to show that under this section profits or discounts have to

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(1) [1921] 1 A. C. 222.

(2) Ibid. 255.

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"be analysed into a return for the use of money by way of "income and a possible accretion to capital." If I may add my own gloss on this latter observation, if the bill of a solvent debtor is discounted at a low rate and the profit from the discount is regarded as interest, it seems logical to regard as interest also the profit from the discount where the bill of a debtor in poor credit is discounted at a high rate. In the former case, the capital risk is very small, or, perhaps, negligible and, in the case of a Treasury bill, to use Lord Sumner's words, reaches its vanishing point. In the latter case, the capital risk may, as Lord Sumner says, be the most important factor in the transaction, but it is nevertheless to be regarded as expressed in terms of interest, and, if the parties choose to express a capital risk in terms of interest, it must normally be so treated and no apportionment can be made. It is interesting to see the official reasons given by counsel for the Crown in the *National Provident* case (1) in the Court of Appeal for distinguishing the profit made on Treasury bills issued at a discount and four per cent. Victory Bonds issued at eighty-five. The latter, said counsel, "were an investment "at the market rate of interest. The increased amount "receivable when drawn for payment at par . . . is an "additional sum bargained for to meet the probable fall in "capital value likely to take place under present conditions."

It may be convenient to sum up my conclusions in a few propositions. (1.) Where a loan is made at or above such a reasonable commercial rate of interest as is applicable to a reasonably sound security there is no presumption that a "discount" at which the loan is made or a premium at which it is payable is in the nature of interest. (2.) The true nature of the "discount" or the premium (as the case may be) is to be ascertained from all the circumstances of the case, and, apart from any matter of law which may bear on the question (such as the interpretation of the contract), will fall to be determined as a matter of fact by commissioners. (3.) In deciding the true nature of the "discount" or premium in so far as it is not conclusively determined by the contract, the following matters together with any other relevant circumstances are important to be considered, namely, the term of the loan, the rate of interest expressly stipulated for, the nature of the capital risk, and the extent to which, if at all, the parties expressly took or may reasonably be supposed to

(1) [1920] 3 K. B. 35, 43.

have taken the capital risk into account in fixing the terms of the contract. In this summary I have purposely confined myself to a case such as the present where a reasonable commercial rate of interest is charged. Where no interest is payable as such, different considerations will, of course, apply. In such a case, a "discount" will normally, if not always, be a discount chargeable under para. (b) of r. 1 to case III. Similarly, a "premium" will normally, if not always, be interest, but it is not necessary or desirable to do more than to point out the distinction between such cases and the case of a contract similar to that which we are considering. For these reasons I am of opinion that the Special Commissioners came to the right conclusion and that their decision ought to be restored.

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MACKINNON L.J. I agree.

DU PARCQ L.J. I agree.

Appeal allowed.

Solicitors: *Jaques & Co., for Alfred Peace, Batley; Solicitor of Inland Revenue.*

H. C. G.

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*Workmen's compensation—Industrial disease—Date of disablement—June 25, 29;
Two certificates—Second certificate fixing no date of disablement—July 16.*

Power of arbitrator to determine date—Claim to separate compensation under each certificate—Continuous disease—Workmen's Compensation Act, 1925 (15 & 16 Geo. 5, c. 84), s. 43, sub-ss. 1 (a), 2.

The Workmen's Compensation Act, 1925, s. 43, sub-s. 1, provides that when the certifying surgeon certifies that a workman is suffering from an industrial disease and the disease is due to the nature of an employment in which the workman was engaged during the twelve months preceding the date of disablement, he is to be entitled to compensation as if the disease were a personal injury by accident arising out of and in the course of his employment. By sub-s. 1 (a): "the disablement . . . shall be treated as the happening of the accident," and by sub-s. 2. "the date of disablement shall be such date as the certifying surgeon certifies as the date on which the disablement commenced, or if he is unable to certify such a date, the date on which the certificate is given."

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When the certifying surgeon does not certify the date of disablement, his certificate does not conclusively fix the date of the notional accident so as to preclude the arbitrator from forming his own judgment on all the evidence available as to the true date of the onset of the disease, and when the arbitrator finds that the disease has persisted in varying degrees of severity since its inception as found by an earlier certificate of the certifying surgeon, but had never completely disappeared, the workmen can only recover compensation under the first certificate.

The principle laid down by Lord Atkin (with the approval of the rest of the House of Lords) in *Richards v. Goskar* [1937] A. C. 304 applied, and the dictum of Lord Hailsham in *Wilsons and Clyde Coal Co. v. Flynn* [1930] A. C. 516, not followed.

Quaere, the correctness of the view taken in *MacNamara v. India Tyre & Rubber Co.* (1937) 30 B. W. C. C. (Supp.) 47, contrary to *Wilsons and Clyde Coal Co. v. Flynn* (supra) and *Eaton v. George Wimpey & Co.* [1938] 1 K. B. 353, that in a case where there have been two certificates the arbitrator has the same liberty on the evidence to decide that the effects of the original disablement were the cause of the injury, although the certifying surgeon had in the second certificate certified a later date of disablement.

APPEAL from Judge Tudor Rees sitting at Uxbridge county court as arbitrator under the Workmen's Compensation Acts.

The workman, George William Walden, was employed by the Mono Concrete Co., Ltd., from 1933 as a concrete caster whose work involved the mixing of dry and wet sand and cement. On August 31, 1936, the certifying surgeon certified that he was suffering from the industrial disease of dermatitis and was thereby disabled. The employers paid him compensation for total incapacity of 30s. a week from that date till December 11, 1936, and on January 20, 1937, he resumed his old work. On October 25, 1940, another certifying surgeon certified him to be suffering from dermatitis and to be thereby disabled, but in the certificate he fixed no date for the commencement of disablement striking out that part of the certificate in which he was to state that date if able to do so. The workman was paid compensation for total incapacity of 35s. a week until November 2, 1942, when the payment was stopped on the ground that he was no longer incapacitated. In December, 1942, he obtained work of a sedentary character at 2l. 15s. a week and was still so employed. His average wages before the first certificate were 3l. 4s. 2d. a week and before the second certificate 4l. 9s. 2d. a week. On December 24, 1942, the workman began proceedings for compensation, claiming an additional 35s. a week between October 25, 1940,

and November 2, 1942, in respect of total disablement under the first certificate and, alternatively, compensation for partial incapacity during the same period, and he also claimed 35s. a week from November 2, 1942, to December 1, 1942, in respect of total disablement under each certificate, and as from December 1, 1942, the proper compensation for partial disablement under each certificate. The county court judge found as a fact on the evidence given before him that the workman never fully recovered from the disease which originally incapacitated him, and that the disease had persisted in varying degrees of severity, but had never completely disappeared. The periods of incapacity were, in his opinion, due to the original outbreak of the disease. There was no second injury or notional accident, nor was there a recurrence. He also found that since November 2, 1942, the workman had been partially incapacitated, having become fit for work in which long standing up would not be necessary, and at which his earning capacity was 2*l.* 15*s.* a week. In his view, the second certificate should be regarded, not as indicating a fresh accident, but as evidence, taken with the other facts, of disablement from the original outbreak of the disease. The workman was, therefore, entitled to no additional compensation during the two periods of total incapacity, and, as the average wages before the first certificate were 3*l.* 4*s.* 2*d.* a week, the compensation as from November 3, 1942, for partial incapacity was 4*s.* 7*d.* a week, being half the difference between 3*l.* 4*s.* 2*d.* and 2*l.* 15*s.* The workman appealed.

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Beney K.C. and *G. Dare* for the workman. Having regard to the wording of s. 43 of the Workmen's Compensation Act, 1925, the workman is entitled to compensation in respect of both the certificates of the certifying surgeons, even though this will give rise to double compensation. Four things have to be proved:—(1.) that the workman is suffering from an industrial disease, (2.) that the disease is disabling him, (3.) that the disease is due to the nature of the employment, and (4.) that he is incapacitated from work. The certifying surgeon's certificate is conclusive as to the first two, and (3.) and (4.) have been found by the county court judge. The certificate of the certifying surgeon is unchallengeable as to the date of disablement, and when no date is given, s. 43, sub-s. 2, provides that it is to be the date on which the certificate is given, while under s. 43, sub-s. 1 (a), the disablement is to be

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treated "as the happening of the accident," the disease causing the disablement being treated by the section as if it were "a personal injury by accident" entitling the workmen to compensation. Having obtained two certificates fixing different dates of disablement the workman is entitled to compensation as though he had had two accidents. Thus, in *Evans v. Oakdale Navigation Collieries, Ltd.* (1), a workman obtained compensation both for an accident and for silicosis; see also *Wheatley v. Lambton Hetton & Joicey Collieries, Ltd.* (2), and *Thompson v. London and North Eastern Ry. Co.* (3). The workman has been employed during the twelve months preceding each certificate on work which might have caused the disease, and he can, therefore, recover in respect of two notional accidents. If the workman had not obtained the second certificate, he could have recovered compensation under the first certificate. The second certificate gives him an additional right. It had been thought that when the first disablement came to an end, that accident was gone, a second certificate being obtained for a subsequent attack of the disease: see *M'Dougall v. Summerlee Iron Co.* (4), but that view was shown to be erroneous in *Richards v. Goskar* (5), where it was held that a workman's right under a certificate can only be ended by a decision of the arbitrator that he has completely recovered or by a lump sum payment by way of redemption: see also *Timmins v. Brodsworth Main Colliery Co.* (6) and *Durrant v. British Fibrocement Works, Ltd.* (7). In spite of the existence of a second certificate, it is a question of fact for the arbitrator whether there has been a return of the old disease or the development of a new one: *Richard Evans & Co. v. Scahill* (8). [LORD GREENE M.R. If the disease is found to have continued, the second certificate is seemingly a nullity.] That is contrary to *Wilsons & Clyde Coal Co. v. Flynn* (9): see also *Eaton v. George Wimpey & Co.* (10). In *McNicholas v. West Leigh Colliery Co.* (11), Romer L.J. said it was the disease that the workman was entitled to treat as the injury and not the disablement, "from which it follows that he does not cease "to be entitled to treat himself as having sustained injury by

(1) (1940) 33 B. W. C. C. 122.

(2) [1937] 2 K. B. 426.

(3) [1935] 2 K. B. 90.

(4) 1927 S. C. (H. L.) 72; 20

B. W. C. C. 419.

(5) [1937] A. C. 304.

(6) [1934] 2 K. B. 361.

(7) (1934) 27 B. W. C. C. 460.

(8) [1927] W. N. 67; 20

B. W. C. C. 348.

(9) [1930] A. C. 516.

(10) [1938] 1 K. B. 353.

(11) (1933) 26 B. W. C. C. 29, 44.

"accident merely because his disablement ceases temporarily." That statement was approved in *Richards v. Goskar* (1) and preferred to *Timmins v. Brodsworth Main Colliery Co.* (2). *Richards v. Goskar* (1) did not deal with the complication of a second certificate, but it is contended that here compensation can be recovered on both certificates. Should it be held that the workman can only recover compensation under one certificate, he is entitled to elect to do so under the second certificate and so obtain compensation for partial incapacity at an increased rate.

J. Alun Pugh for the employers. The arbitrator having awarded compensation under the first certificate on the ground that the disease was continuous, the workman cannot seek to reverse this and claim for partial incapacity under the second certificate, nor can he claim to recover under both certificates. The second certificate must be regarded as no more than evidence of disablement from the disease enabling the workman to show that he is suffering from injury under the first certificate: *Meredith v. Ebbw Vale Steel, Iron and Coal Co.* (3), relied on by Slessor L.J. in his dissenting judgment in *Timmins v. Brodsworth Main Colliery Co.* (2). It is fallacious to say that the date of the certificate is to be taken to be the date of the accident. The question what is the cause of the accident arises and that may be the original disease: *Richards v. Goskar* (1): see also *Wheatley v. Lambton, Hetton & Joicey Collieries, Ltd.* (4), where a declaration of liability was made to keep alive a possible claim in respect of nystagmus. When the certifying surgeon does not fix a date of disablement, it is possible to go behind the date of the certificate to find the date of the accident. That is what was done here, and it is traced back to the original accident in 1936. That accords with the decision of the Court of Session in *MacNamara v. India Tyre & Rubber Co.* (5), where *Richards v. Goskar* (1) is referred to. If the workman's contention was correct, he could gradually collect a number of certificates and recover on them all.

Beney K.C. replied.

Cur. adv. vult.

July 16. DU PARCQ L.J. read the following judgment of the court (LORD GREENE M.R., MACKINNON and DU PARCQ

(1) [1937] A. C. 304.

(4) [1937] 2 K. B. 426.

(2) [1934] 2 K. B. 361.

(5) (1937) 30 B. W. C. C.

(3) (1925) 18 B. W. C. C. 251.

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L.JJ.). The workman's claim and the contentions by which it was supported, may be summarized as follows:—First, it was said that the certified disablement of 1936 and the certified disablement of 1940 must, by reason of s. 43, sub-s. 1, (a), be regarded as indicating the occurrence of two distinct accidents. By reason of s. 43, sub-s. 2, the date of the latter accident must be taken to be October 25, 1940. Each accident had resulted in disablement. For each accident, therefore, the workman was entitled to compensation. It was true that for the period between October 25 and November 2 the workman had already received compensation on the footing of total incapacity, but that merely compensated him for the second notional accident, and he was entitled (so it was contended) to a further sum by way of full compensation for total incapacity attributable to the first certified disablement, otherwise referred to as the first notional accident, and to the same measure of compensation in respect of each disablement from November 2 to December 1. To the objection that, if this claim were allowed, the workman would be receiving compensation twice over in respect of the same incapacity, the answer was made that this result necessarily followed from the provisions of the Act, as these have been interpreted in the courts. From December 1, 1942, he claimed on the same principles to be entitled to "the proper compensation for "partial disablement in respect of each certified disablement." In the alternative, however, it was submitted that the workman, if he were compelled to rely on only one of the two notional accidents, was free to choose between them as he might elect. In the present case it was to his advantage to select the second disablement, since his pre-accident wages would then be greater in amount than if the former disablement were treated as the cause of the incapacity.

The learned arbitrator rejected both these contentions. He found as facts, and it is not disputed that there was evidence to support the findings, that, to use his own words, "the "workman never fully recovered from the disease which "originally incapacitated him," and that "there was not a "second injury or notional accident, nor was there a "recurrence". The disease had never completely abated, so that, in the view of the arbitrator, it was wrong to speak of it as having recurred. The learned arbitrator expressed the view that "the second certificate, in the circumstances of this "case, should be regarded, not as indicating a fresh 'accident'

"or period of disablement, but as evidence—taken with the "other facts—of the continuance of the original outbreak of "the disabling disease." In the result, the workman was awarded compensation on the basis of his average weekly earnings during the twelve months previous to the first certificate. The amount payable on this basis is 4s. 7d. a week, whereas if the workman's alternative contention prevailed, he would be entitled to 17s. 1d. a week.

If there was, in truth, no new outbreak of disease in 1940 and if what the certifying surgeon then found was merely one of a long series of manifestations of a disease from which the workman had suffered ever since 1936, it seems plain, at first sight at any rate, that the workman should not be compensated as if he had been attacked by the disease in 1940. Under s. 43 the workman is to be compensated "as if the disease "were a personal injury by accident arising out of and in the "course of his employment." If the arbitrator's findings are to be accepted, the notional accident which caused all the personal injuries from which he has suffered occurred in 1936, and he has suffered no disablement from any other. It was contended, however, that the arbitrator had found facts which the provisions of s. 43 precluded him from finding, and that they were based on evidence which he ought not to have admitted. This contention was supported by reference to s. 43, sub-s. 1 (a), which provides that "the disablement "shall be treated as the happening of the accident," and s. 43, sub-s. 2, which says: "For the purposes of this section "the date of disablement shall be such date as the certifying "surgeon certifies as the date on which the disablement "commenced, or, if he is unable to certify such a date, the date "on which the certificate is given." The certifying surgeon who gave the 1940 certificate was unable to certify the date on which the disablement commenced. The date of the certificate was October 25, 1940. That, it was submitted, was conclusive evidence that the disablement began on October 25, 1940, and since the disablement is to be treated as the happening of the accident, it was argued that the certificate conclusively established that the workman had been the victim of a notional accident on October 25, 1940, and that this notional accident resulted in his disablement. This is the basis of the contention that the arbitrator had no right to hear evidence, or to find facts, which contradicted the surgeon's certificate. Admittedly neither the certifying surgeon nor anyone else had any reason

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to think that the disablement in fact commenced on October 25, 1940. It was clear also that, whether or not the arbitrator ought to have investigated the facts, he had satisfied himself by investigating them that the disease and the disablement which it produced commenced in 1936 and had continued to the present time, although there were periods during which the disease was temporarily quiescent, so that for the time being the workman was capable of work. Nevertheless, we were told that the words of the section and the decided cases compelled us to hold that the learned arbitrator should have decided this case, not according to the facts, but according to what may be called a statutory fiction.

It is unnecessary to pass in review all the authorities which were cited to us. The most convenient starting-point for a consideration of these authorities is the latest of the relevant decisions of the House of Lords, *Richards v. Goskar* (1), in which earlier authorities were reviewed by Lord Atkin. The short speeches of the other learned lords show that Lord Atkin's opinion may be taken as expressing the considered view of the House of Lords. Undoubtedly, it clarified the law. It had previously been supposed that the decision of the House of Lords in *M'Dougall v. Summerlee Iron Co.* (2) had dealt with a question of law, namely, the construction of s. 8 of the Act of 1906, the section which is reproduced in s. 43 of the present Act. There was, certainly, some justification for this view, since Lord Dunedin, in his speech in *M'Dougall's* case (2), had made it clear that, in his opinion, it was a question of law and not of fact which was being decided. Scottish, as well as English, courts had acted on what is now shown to have been an erroneous view of the scope of the decision, and *M'Dougall's* case (2) is said by Lord Mackay to have been the foundation of at least ten judgments in two countries since 1927 (3). In *Richards v. Goskar* (1), however, an elaborate analysis of the decision revealed that it had, after all, turned on a question of fact. What it decided was that an inference of fact which had been drawn by the arbitrator could not be supported. The decision in *M'Dougall's* case (2) can, therefore, throw no light on the present problem. The workman's case can derive no support from it, and it need not be further considered.

(1) [1937] A. C. 304.

(3) *MacNamara v. India Tyre*

(2) 1927 S. C. (H. L.) 72; 20 & *Rubber Co.*, 30 B. W. C. C. B. W. C. C. 419. (Supp.) 47, 65.

Another decision of the House of Lords which must now be read in the light of *Richards v. Goskar* (1) is that in *Wilsons & Clyde Coal Co. v. Flynn* (2). It is unnecessary to set out the facts of that case. It was relied on by counsel for the workman as establishing the proposition that it is not competent for an arbitrator to find, or to hear evidence tending to prove, that the date of disablement is other than that which by s. 43, sub-s. 2, is deemed to be the date of disablement when the certifying surgeon is unable to certify such a date. This argument derived strong support from the following passage in the speech of Lord Hailsham (3): "The fact that the sub-section provides that if the certifying surgeon is unable to certify the date on which disablement commenced, then that date shall be the date on which the certificate is given, seems to me wholly inconsistent with the view that it shall be a date to be ascertained by the arbitrator upon evidence adduced before him." In the case then before the House, however, the certifying surgeon had been able to certify the date on which the disablement had commenced, and had, in fact, certified a date. Lord Atkin in *Richards v. Goskar* (1), speaking, as we have said, with the assent of the other learned lords who were present, said that he did not regard *Wilson's* case (2) as deciding anything but the finality of the certificate "when the certifying surgeon has fixed the date of disablement." It would seem, therefore, that the observations of Lord Hailsham which we have quoted must be regarded as dicta not necessary to the decision and of no binding force. The decision in *Wilson's* case (2) was followed in this court in *Eaton v. George Wimpey & Co.* (4). There, also, the certifying surgeon had been able to certify the date when the disablement commenced.

The present case is, therefore, distinguishable from *Wilson's* case (2) and from *Eaton v. George Wimpey & Co.* (4). The distinction is quite clearly indicated in the passage in Lord Atkin's speech which we have quoted, and is certainly not without a basis of fact and reason. When the date of the disablement is unknown to, and undiscoverable by, the certifying surgeon, it must often happen that all that can be said with certainty is that, whatever the true date may be, it is not the date on which the certificate was given. It is satisfactory to find, therefore, that we are not bound by

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(1) [1937] A. C. 304.

(3) Ibid. 522.

(2) [1930] A. C. 516.

(4) [1938] 1 K. B. 353.

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It is not necessary or desirable to add to what was said in *Richards v. Goskar* (1) any lengthy exposition of the principles to be applied in construing s. 43, but it may be well to state very shortly what we understand those principles to be. The clue to the correct interpretation of the section is to be found in the words "as if the disease . . . were a personal injury by accident arising out of and in the course of that employment." When the language appropriate to disease is translated into the language appropriate to injury by accident, it is the disease, and not the disability, which is made equivalent to the accident and the injury resulting from it. The disablement follows the accident. It is not itself the accident. A certificate of disability given under s. 43 in which no date is certified proves no more than that the workman was disabled. In case of dispute, it is for the arbitrator to decide when the disease which caused the disability began, just as in cases of injury by accident he has to decide when the accident which caused the injury occurred. The object of s. 43, sub-s. 1 (a), is to provide a means of fixing the stage at which the progressive disease can reasonably be treated as an injury by accident: see per Lord Atkin in *Richards v. Goskar* (1). The effect of s. 43, sub-s. 2, is to fix the time of the happening of the accident "for the purpose of notice and for some purposes of calculating wages." Unless the certifying surgeon certifies a date, his certificate does not conclusively fix the date of the notional accident or preclude the arbitrator from forming his own judgment on all the evidence available as to the true date of the onset of that disease which caused the disablement.

It is right to add that, since the decision in *Richards v. Goskar* (1), it has been held by the Court of Session that, even where the certifying surgeon had certified a date, the arbitrator was entitled to find that the workman was, in fact, suffering from the effects, not of a notional accident deemed to have occurred on that date, but of an earlier disablement: *MacNamara v. India Tyre & Rubber Co.* (3). As Lord Mackay pointed out in his dissenting judgment (4), it seems impossible to reconcile this decision with *Wilson's* case (5), which remains

(1) [1937] A. C. 304.

(2) Ibid. 312.

(3) 30 B. W. C. C. (Supp.) 47.

(4) Ibid. 65.

(5) [1930] A. C. 516.

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a binding authority for the limited proposition stated by Lord Atkin and as such was followed by this court in *Eaton v. George Wimpey & Co.* (1). Save for the distinction to which we have alluded, the facts in the case before the Court of Session resembled in all material respects those in the present case, and it was held, applying the principles laid down in *Richards v. Goskar* (2) that the arbitrator was entitled to make his award on the footing that the earlier disablement was the only "injury by accident" in respect of which the workman ought to be compensated. We have derived great assistance from this Scottish authority, and, with the one exception to which we have referred, we find ourselves in full accord with the views expressed by the majority of the Court of Session. It may be hoped that the House of Lords will before long have an opportunity of deciding whether, on the one hand, Lord Mackay's dissent was justified and the decision of this court in *Eaton v. George Wimpey & Co.* (1) was correct, or, on the other hand, this court has wrongly held itself bound by the decision in *Wilson's* case (3). Meanwhile, there is an unfortunate divergence between the views of the two countries as to the true interpretation of s. 43, sub-s. 2. It may, perhaps, be said that the Court of Session has logic on its side, while this court may humbly lay claim to a more scrupulous regard for authoritative precedent. It is some satisfaction to know that our decision in this case will be in accordance with the view of the Court of Session.

In our opinion, the arbitrator has correctly interpreted the section. He has found the facts which it was his duty to find, and on those findings has come to the only possible conclusion as to the workman's rights. As there was only one "notional accident" which resulted in disablement, the question whether the workman could have recovered compensation twice over if there had been two notional accidents does not arise. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Barlow, Lyde & Gilbert; Hair & Co.*

(1) [1938] 1 K. B. 353.

(3) [1930] A. C. 516.

(2) [1937] A. C. 304.

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June 25, 29; *Landlord and tenant—Rent restriction—Furnished letting—"Furniture"*
July 26. —*Fixtures—Rent and Mortgage Interest Restrictions Act, 1939*
(2 & 3 Geo. 6, c. 71), s. 3, sub-s. 2 (b).

By a tenancy agreement, dated October 8, 1940, a flat was let to a tenant for three months from October 11, 1940, and thereafter from month to month, terminable by one calendar month's notice in writing, at the rent of 78*l.* payable in equal monthly sums. The tenant agreed to keep all the furniture, fittings, and fixtures set out in the second schedule to the agreement in good and tenantable repair. A large number of articles included in this schedule were articles attached or fitted to the freehold which, if loose, would undoubtedly have been furniture :—

Held (by MacKinnon and du Parcq L.JJ., Lord Greene M.R. dissenting), that the word "furniture" in the Rent Restrictions Acts must be given its ordinary popular meaning, and an article within the ordinary description of furniture need not be movable (or need at most be capable of being moved) to constitute it furniture, and that, the flat being let at a rent which included a substantial payment for the use of furniture, it was excepted from the application of the Rent Restrictions Acts by virtue of s. 10, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923, and s. 3, sub-s. 2 (b), of the Rent and Mortgage Interest Restrictions Act, 1939.

Per Lord Greene M.R. Premises are let as furnished premises when the use of the articles on the premises, to which a substantial part of the rent is attributable, is enjoyed by the tenant under a separate contract of hiring and does not pass under the demise of the premises.

APPEAL from Clerkenwell county court.

By a tenancy agreement, dated October 8, 1940, the landlord, Mrs. Pauline Gray, let to the tenant, John William Fidler, a flat known as 50 Trinity Court, Grays Inn Road, London, one of a block of ninety flats, for three months from October 11, 1940, and thereafter from month to month, terminable by either party by a calendar month's notice in writing, at the yearly rent of 78*l.* payable in advance by equal monthly payments, and for the sum of 6*l.* per annum payable monthly for the hire and maintenance of an electric hot water heater, cooker, two heating stoves, meter rent and the fixed charge for obtaining a flat rate for the whole of the electric supply. The tenant agreed (among other things) to keep all the furniture and fittings and fixtures (a list of which was set out in the second schedule to the agreement) in good and tenantable

repair. The second schedule, headed "fixtures and fittings," was as follows: "Bed sitting room: Two fitted wardrobes "with mirrors; two fitted bed cupboards and beds; loose "sideboard; inlaid cork linoleum; three electric fittings with "lamps and shades; two bracket electric lights with shades and "lamps over beds; one standard lamp; one three-kilo electric "stove. Kitchen: Electric refrigerator; electric "cooker; electric fitting with shades and lamps; fitted "cupboard with drawers; linoleum on floor. Bathroom: "Linoleum on floor; fitted dressing table with three mirrors; "electric light fittings with shades and lamps; fitted cup- "board and drawers; shower with rubber curtains; glass "mirror and shelf over lavatory basin; chromium plated hot- "water towel rail. Hall: Linoleum on floor; electric stove; "fixed mirror over mantelpiece; two fitted cupboards with "drawers; electric light fitting with lamps and shades." On May 14, 1942, the landlord gave the tenant a month's notice in writing terminating the tenancy, and, the tenant having failed to give up possession, the landlord on August 13, 1942, commenced proceedings by specially endorsed writ claiming possession of the flat and of the furniture, fixtures and appurtenances, together with mesne profits from July 11, 1942. The tenant having obtained leave to defend, the case was remitted to the county court, and the tenant, by his defence, relied on the Rent Restrictions Acts (1), contending that the premises were not a furnished dwelling-house within the meaning of the Acts, as the only furniture provided, as opposed to fixtures and fittings, was one standard lamp, and that the amount of the rent fairly attributable to the use of the

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(1) Rent and Mortgage Interest Restrictions Act, 1923, s. 10, sub-s. 1, provides: "For the "purposes of proviso (i.) to sub-s. 2 "of s. 12 of the principal Act "(which relates to the exclusion "of dwelling-houses from the "principal Act in certain circum- "stances), a dwelling-house shall "not be deemed to be bona fide "let at a rent which includes pay- "ments in respect of attendance "or the use of furniture unless the "amount of rent which is fairly "attributable to the attendance "or the use of the furniture, regard

"being had to the value of the "same to the tenant, forms a "substantial portion of the whole "rent."

Rent and Mortgage Interest Restrictions Act, 1939, s. 3, sub-s. 2: "The principal Act "shall not, by virtue of this section, "apply— . . . (b) save as expressly "provided in the said Acts, as "amended by virtue of this "section, to any dwelling-house "bona fide let at a rent which "includes payments in respect of "board, attendance or use of "furniture"

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furniture, having regard to its value, was not a substantial part of the whole rent. The county court judge held that the following items in the second schedule to the tenancy agreement were furniture: (a) two fitted wardrobes with mirrors and two fitted bed cupboards and beds forming a combined composite piece of furniture made of solid oak by furniture makers; (b) loose sideboard which, though never, in fact, delivered to the tenant, would have been delivered if asked for; (c) linoleum throughout the flat; (d) electric fittings with lamps and shades which were not fixtures as the universal practice was for the tenant putting them in to remove them at the end of the tenancy; (e) standard lamp; (f) electric refrigerator which was only connected by wires to the electric system; (g) rubber curtain; (h) mirror and shelf over basin, the former attached by screws and the latter detachable; (i) hot water roller (? rail) in bathroom. The value of these items was 120*l.*, and the annual value for interest and deterioration was 20*l.* Whether the rent was taken with or without that part of the sum paid which was attributable to rates, the annual sum of 20*l.* for the use of the furniture formed a substantial part of the whole rent within s. 10, sub-s. 1, of the Act of 1923; and although the flat was not let at a rent which included services apart from the attendance of the porter to remove dust and refuse, the flat was a dwelling-house excluded from the application of the Rent Restrictions Acts by s. 3, sub-s. 2, of the Act of 1939. The tenant appealed.

Beyfus K.C. and *Salkeld-Green* for the tenant. That which is annexed or attached to the freehold is a fixture and not furniture. The test to be applied is whether a particular article would pass under a contract to buy furniture or under a legacy of furniture. If it is a fixture it would not pass: see *Crane v. Cox* (1); *Rimmer v. Carson* (2); and *Wilkes v. Goodwin* (3). This test was laid down in *Finney v. Grice* (4), followed in *In re Seton-Smith* (5). It cannot, therefore, be said that "furniture" in the Rent Restrictions Acts includes fixtures, especially as an exception to an Act should be strictly construed if there is any doubt about its meaning. The correct view is that, whatever is attached to the freehold is an addition to the freehold and a fixture passing under a demise of the

(1) (1923) 92 L. J. (K. B.) 544.

(2) (1923) 39 Times L. R. 349.

(3) [1923] 2 K. B. 86, 95.

(4) (1878) 10 Ch. D. 13.

(5) [1902] 1 Ch. 717.

freehold. Machinery affixed to a concrete bed by bolts and screws is a fixture: *Crossley Brothers, Ltd. v. Lee* (1). It is immaterial that a fitted article such as a fitted wash basin takes the place of what up to then was furniture. It is none the less a fixture. In the present case the beds were attached to the premises. A chattel fixed for purposes of its better enjoyment is still part of the freehold. The sideboard cannot be taken into account because, though specified in the second schedule, it was never supplied: see *Brown v. Robins* (2). The right to call for an article of furniture is not the same thing as having the use of it. In the Oxford Dictionary the word "furniture" is given the meaning of any movable article. The county court judge is in error in calling electric light fittings furniture because they are normally removable by the tenant. That only makes them tenant's fixtures. Of the articles which the county court judge has held to be furniture, that is only true of linoleum, unless so attached as to become a fixture; the standard lamp; electric refrigerator if, in fact, it is only plugged into the wall; and the rubber curtain. All the other articles are fixtures. It is to be noted that here the lease contained no demise of furniture.

Comyns Carr K.C. and *Merlin* for the landlord. The whole question is whether the flat was let furnished or unfurnished, and, in fact, nothing but one or two tables and chairs would be required as an addition to the furniture already in the flat. The proper test is to see whether there were in the flat many articles that no one would expect to find in an unfurnished house, and it is unnecessary to go into details as to the attachment or non-attachment of articles of furniture to the freehold. It is a pure question of fact and not of law: *Wilkes v. Goodwin* (3); *Lyon & Co. v. London City and Midland Bank* (4), where chairs attached to the floor were still held to be chattels; and *Reynolds v. Ashby & Son* (5), where the test applied was whether machinery was attached to the freehold for more convenient use. To become fixtures articles must be attached to the property in so permanent a way as to become part of the land. [They referred to *Holland v. Hodgson* (6) and *Leigh v. Taylor* (7).] The question of the design and purpose of annexation to the premises was one for the county court

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(1) [1908] 1 K. B. 86, 89.

(2) [1943] W. N. 93.

(3) [1923] 2 K. B. 89.

(4) [1903] 2 K. B. 135.

(5) [1904] A. C. 466.

(6) (1872) L. R. 7 C. P. 328.

(7) [1902] A. C. 157.

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judge. *Finney v. Grice* (1), on which the tenant relies, is not a decision that everything attached to the freehold ceases to be furniture. There Sir George Jessel only held that the articles in question were not in the ordinary use of language such articles as fell within the category of furniture. The county court judge's decision as to the articles in the second schedule to the tenancy agreement that were furniture is correct with the possible exception of the hot water roller if by that was meant the hot water rail, but that is a trivial matter. [They also referred to *Paton v. Sheppard* (2).

Beyfus K.C. replied.

Cur. adv. vult.

July 26. The following judgments were read.

LORD GREENE M.R. If my brethren had not taken a view different from my own, I should have thought that this was a reasonably clear case.

Under s. 3, sub-s. 2 (b), of the Rent and Mortgage Interest Restrictions Act, 1939, the Rent Restrictions Acts (as they may conveniently be called) do not apply "to any dwelling-house "bona fide let at a rent which includes payments in respect of "board, attendance or use of furniture." By s. 10 of the Act of 1923, as amended by sch. I. to the Act of 1939, the flat here in question is not to be "deemed to be bona fide let at a "rent which includes payments in respect of attendance or "the use of furniture unless the amount of rent which is fairly "attributable to the attendance or the use of the furniture, "regard being had to the value of the same to the tenant, "forms a substantial portion of the whole rent." The complaint made by the tenant is (1.) that the county court judge has treated as "furniture" certain fittings or fixtures which are not furniture, and (2.) that, in determining whether the amount of rent which he decided to be fairly attributable to the use of furniture formed a substantial part of the whole rent, he had no regard to its value to the tenant.

The first of these questions raises a question of law of some general importance, and, apart from the special language of the tenancy agreement, the answer to it depends, in the first place, on the true interpretation of the word "furniture" in s. 3, sub-s. 2 (b), of the Act of 1939. Mr. Comyns Carr argued that no question of interpretation arises. I say no

(1) 10 Ch. D. 13.

(2) (1839) 10 Sim. 186.

more than that I disagree with him. I will refer later in more detail to the various things which the county court judge held to be "furniture." At the moment it is sufficient to say that they fall into two classes: (1.) loose articles which are admittedly "furniture" and do not pass under a demise of the flat; (2.) what in building and architectural circles are usually called "fitments," that is to say, conveniences in the shape of fittings fixed to the structure of the flat which perform functions similar to those of loose articles of furniture, but quite clearly do pass under a demise of the flat. They are, in fact, "fixtures" within the true meaning of that word, since they are affixed to and form part of the inheritance, although, if the lessor here is, as she probably is, herself a leaseholder, she is entitled to remove them as against her lessor. The learned county court judge appears to have thought that, as (i.) the various things in this class fulfil the same functions as corresponding articles of loose furniture, and, (ii.) a tenant, if he had himself affixed them, could have removed them at any time during the tenancy, they are, therefore, "furniture" for the purpose of s. 3, sub-s. 2 (b), of the Act of 1939. With regard to (i.), the fact stated is undoubtedly correct. It is in respect of (ii.) that the learned county court judge, in my opinion, fell into an error since, for reasons which will appear, the fact that a tenant, if he had himself affixed these things, could have removed them is, as it seems to me, an entirely irrelevant consideration.

In my opinion, apart from the special language of the tenancy agreement itself, the answer to this question is to be found in the language of s. 3, sub-s. 2 (b), of the Act of 1939. That paragraph assumes the existence of two distinct kinds of subject-matter, namely, (1.) a dwelling-house, (2.) matters distinct from the dwelling-house, namely, board, attendance and the use of the furniture. It also treats an inclusive rent as severable into two elements, one of which is to be referred to the dwelling-house, and the other of which is to be referred to the matter or matters distinct from the dwelling-house. In the case of furniture the latter element is referable to the "use" of the furniture. Now, if, as in the present case, the "use" of the things in question is something which the tenant enjoys ipso facto under the demise of the dwelling-house, that "use" is included in that element in the rent which is referable to the dwelling-house. The matter may be put in another way. "Board" and "attendance" are matters which

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are provided for the tenant by virtue of a contract distinct from the demise of the dwelling-house. The collocation of the words "use of furniture" with "board" and "attendance," is a clear indication that in the case of furniture also the use of it is something which the tenant enjoys under a contract distinct from the demise of the dwelling-house. *Noscitur a sociis*. The section is, therefore, contemplating the case where there is (1.) a demise of a dwelling-house, (2.) a contract distinct from the demise under which the tenant enjoys the benefits of a contract for the supply of goods, a contract for services, or a contract of hiring furniture, as the case may be.

Two questions, therefore, may arise in any given case. First, are the things in controversy things of which the tenant enjoys the use otherwise than by virtue of the demise itself? Secondly, if so, are those things "furniture"? In the present case the things of which the tenant enjoys the use otherwise than by virtue of the demise are admittedly "furniture." No question, therefore, arises with regard to them. The controversy relates to the things which, as I have already said, the tenant clearly enjoys by virtue of the demise itself, and, therefore, are, in my opinion, not "furniture" within the meaning of the paragraph.

The language of the tenancy agreement deserves more attention than it received during the course of the argument. In cl. 2 (3.) a clear distinction is drawn between "furniture" and "fittings and fixtures." In sub-cl. 6 "cupboards" are referred to as "fixtures." Sub-cl. 13 refers to "Fixtures 'fixed or belonging to the flat.'" The second schedule contains descriptions which I will number for convenience of reference, namely, (1.) "two fitted wardrobes with mirrors"; (2.) "two fitted bed cupboards and beds"; (3.) "three-light electric fitting with lamps and shades" in the bed-sitting room; (4.) "electric centre fitting with shade and lamp"; and (5.) "fitted cupboard with drawers" in the kitchen; (6.) "fitted dressing-table with three mirrors"; (7.) "two electric light fittings with shades and lamps"; (8.) "fitted cupboard and drawers" in the bathroom; (9.) "two fitted cupboards with drawers"; and (10.) "electric light fitting 'with lamp and shade'" in the hall. As a mere matter of construction of the document, it seems to me clear that, as between the parties, all these things are to be regarded not as "furniture," but as fittings, since they are so described.

Moreover, Nos. (2.), (5.), (8.) and (9.) are "cupboards," and sub-cl. 6 of cl. 2 of the agreement refers to cupboards as "fixtures." The importance of this aspect of the matter lies in the fact that there is nothing to prevent a landlord and a tenant agreeing that for the purposes of the lease a loose article which would normally fall under the word "furniture" shall be regarded as a "fixture." In *Burns Wallace v. Hardingham* (1), a house was let with "fixtures as in "schedule," and the schedule mentioned (inter alia) linoleum. Lord Sterndale M.R. and Atkin L.J., sitting as a Divisional Court, held that it was not furniture, the reason being (as was pointed out by Scrutton L.J. in *Wilkes v. Goodwin* (2)), that the parties themselves did not treat the linoleum as furniture (which normally it would have been) but as a fixture.

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Of the articles which I have numbered, the following were held by the county court judge to be "furniture" within the meaning of para. (b) of s. 3, sub-s. 2, of the Act of 1939, namely, Nos. (1.) (fitted wardrobes) and (2.) (fitted bed cupboards), which he said "really form one composite piece of furniture"; Nos. (3.), (4.), (7.) and (10.) (electric light fittings). I will develop later my view, already expressed, that, quite apart from the express language of the tenancy agreement itself, all these articles are fixtures, the use of which the tenant has by virtue of the demise itself and not by a contract of hiring distinct from the demise, but, in any event, the parties have in terms agreed to treat them as "fittings" and not as "furniture," and for this reason alone the decision with regard to them ought not to stand.

Having regard to the conclusions which he reached on the question of value, the county court judge expressed no opinion on Nos. (5.) (fitted cupboards in kitchen); (6.) and (8.) (fitted dressing-table and fitted cupboard in bathroom); or (9.) (two fitted cupboards in hall). It may be that No. (5.) is what he refers to as a "dresser," in which case he seems to have held that it was not furniture. Subject to this item, had he found it necessary to deal with these articles he would, apparently, on the principle which he adopted, have held them to be furniture, and counsel for the landlord argued that they ought to be so treated. Both on the language of the tenancy agreement and on the more general principle as to fixtures, with which I will deal later, I am of opinion that these things are not "furniture." The second schedule contains

(1) Unrep. (2) [1923] 2 K. B. 86, 101.

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descriptions of a number of articles which are clearly or admittedly furniture and not fixtures or fittings. These are "loose sideboard" (on which a special point arises) and "standard lamp" in the bed-sitting room, "electric refrigerator" and "linoleum" in the kitchen, "linoleum" and "rubber curtains to shower-bath" in the bathroom, and linoleum in the hall. The county court judge rightly held that all of these were "furniture." The linoleum was not fastened down. There were also two electric stoves and an electric table cooker which were included in the 6*l.* payable under the agreement. The judge was not satisfied that these were furniture. There remain two other items which the judge held to be furniture, namely, a mirror and shelf over basin in the bathroom, and what he calls a "hot-water roller" in bathroom," obviously the same as what is described in the second schedule as "chromium plated hot-water towel rail." The mirror and shelf are of a well-known type, and are obviously fixtures. The towel rail is also obviously a fixture. These items are not described in the second schedule as being fittings, and the position with regard to them must be ascertained independently of the language of the agreement.

As I have said, the judge dealt with the question without regard to the language of the agreement, and it now becomes necessary to examine the position on that basis. The judge, in holding the various fixtures which I have described to be furniture, based his decision on the general ground that, if they had been affixed to the premises by the tenant, he could have removed them, and that they would, therefore, remain furniture, and he added "would they be any the less furniture if they belonged to the landlord?" He alluded to the fact that some of these things had been made by furniture-makers. He dealt at greatest length with the wardrobes and bed cupboards in the bedroom which are affixed to the wall by screws, the wardrobes (but not the bed cupboards) having wooden backs. When the bed-cupboards are opened the beds (which when not in use stand upright against the wall with their legs folded) descend on hinges screwed on wood screwed into the floor. The object of screwing the fitment to the wall he found to be to prevent it moving or falling forward when the beds are moved up or down. This method of fixing, he held, negatived any intention on the part of the landlord "to affix the article so as to make it a fixture forming part of the realty, and so

"brings the article within the second principle in *Leigh v. Taylor* (1)." The electric light fittings with their shades and bulbs he held not to be fixtures at all. "The practice," he said, "is universal for the tenant (if he supplied them) to 'remove them at the end of his tenancy.'" He gave his reasons for holding that the mirror and shelf and the towel rail were furniture.

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In my opinion, the judge approached the question before him from a wrong point of view. The question is not what would have been the proper description and status of these articles if they had been affixed by the tenant. Nor is it relevant to consider what the position would have been if the landlord had disconnected them before the tenancy agreement was made. Nor is it relevant to consider what would be the position as between the landlord and a superior lessor. The question, in my opinion, is: Did they pass by the demise itself, or are they articles the use whereof is enjoyed by the tenant under a distinct contract of hiring? There can only be one answer to this question.

The test which I consider to be the right one, namely, did the use of the articles come to the tenant by virtue of the demise, follows, in my opinion, from the clear language of the statute. It has the merit of easy and universal application. If it is not the right test, very few modern flats will fall within the Acts, since space-saving fittings, such as fitted wardrobes, cupboards, etc., are the rule and not the exception. It covers the common case of the kitchen dresser screwed to the wall. I can see no ground for holding that such a dresser is not furniture, if the test adopted by the judge is the right one, since, if a tenant affixes such a dresser, he can remove it. It is worthy of remark that in no case has it ever been suggested that fitted wooden cupboards (which have been common for years) or dressers are furniture, a fact all the more remarkable when it is remembered that before the Act of 1923, the inclusion of any article of furniture was sufficient to take the case out of the Acts: *Wilkes v. Goodwin* (2). There is another point worth noting. Under the Act of 1920 business premises were for a time within the Acts. If let together with the use of furniture, they were outside the section: *Necchi v. Cranchi* (3); and the principle just cited from *Wilkes v. Goodwin* (2) would have applied. Fitted cupboards

(1) [1902] A. C. 157, 158.

(3) (1921) 37 Times L. R. 934.

(2) [1923] 2 K. B. 86.

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and other fittings of the same kind are to be found in most shops and many other business premises, and it would, accordingly, have been the exception for such premises to fall within the Acts.

The test which I favour can be examined from other points of view. A contract to sell these flats would have covered all these articles. The vendor could not have removed them after the signing of the contract. If the flats had been devised by will to one person and the furniture bequeathed to another, these articles would have gone to the devisee. These two tests are taken as the right ones by Scrutton L.J. in *Wilkes v. Goodwin* (1), where he says: "would the article or articles 'in question pass under a contract to buy the 'furniture' 'in the house, or a will bequeathing the 'furniture' in a 'house?'" There is authority on the question. In *Crane v. Cox* (2) it was held that fixtures and fittings were not furniture, and articles held to be fixtures or fittings were a gas-cooker, blinds, a gas-fire, cornice poles and gas brackets, all of which, according to the reasoning of the judge in this case would be furniture. This decision has stood in the books uncriticized on this point. The comments on it in *Wilkes v. Goodwin* (1) were directed to a different matter. Since the decision in *Crane v. Cox* (2) the Acts have been amended time and again. Sect. 10 of the Act of 1923 dealing with furniture was, no doubt, passed to remedy the defects disclosed in the decision of *Wilkes v. Goodwin* (1). Sect. 3, sub-s. 2 (b), of the Act of 1939, corresponds to the like provision in the Act of 1920 (s. 12, sub-s. 2 (i.)), and ss. 9 and 10 of the Act of 1920, which limit the charges to be made in cases where rent includes "payment in respect of the use of furniture," were applied to houses under the Act of 1939 by sch. I. to that Act. It is impossible to suppose that, if the legislature had desired to alter the meaning of the word "furniture" as interpreted in *Crane v. Cox* (2), it would not have done so, particularly when it is remembered that s. 10 of the Act of 1920 and its application by the Act of 1939 create a criminal offence.

I have already referred to certain observations of Scrutton L.J. in *Wilkes v. Goodwin* (1). The article in question in that case was linoleum, and one argument was that it was not "furniture." It was held by this court that it was "furniture." Bankes L.J. referred to that word as a

(1) [1923] 2 K. B. 97.

(2) 92 L. J. (K. B.) 544.

"common and well understood word" (1), and later (2) he said: "the only safe guide to what constitutes 'furniture' within the meaning of the Act is to consider first whether the article or articles in question come within the popular meaning of the word." Similarly, Scrutton L.J. (3) said: "The first question will be answered by taking the ordinary use 'of 'furniture'." The court was dealing with a loose article and not with fixtures or fittings, but the test is applicable in the case of fixtures or fittings, too, since the ordinary popular meaning of the word "furniture" is confined to movable articles, as appears from the definition in the New Oxford Dictionary. The county court judge referred to *Leigh v. Taylor* (4), but that case was not concerned with what passes under a demise. It dealt solely with the question whether, as between the executor of a limited owner and the remainderman, the former has the right to remove the ornamental tapestry. It was held, to use the words of Lord Halsbury (5), that there was nothing which pointed to any intention to dedicate these tapestries to the house. Here the question, in my opinion, is an entirely different one and is, what as between landlord and tenant, passed by the demise.

It was argued that, if an article which serves the same purpose as a corresponding piece of loose furniture, ceases to be furniture if it is so fixed as to pass by virtue of the demise, such an article as a table or a settee, if screwed to the floor at the date of the demise would not be furniture for the purposes of the statutes. This argument leaves me unperturbed. It is for the lessor to show that the dwelling-house is excluded from the Act by reason of the inclusion of furniture. If he chooses so to equip the dwelling-house that articles which he might have let to the tenant as movable articles under a contract of hire, had he so chosen, pass instead under the demise itself he can scarcely complain. He cannot be heard to say to the tenant: "True it is that I let these articles to you as part of the dwelling-house, nevertheless now that there is a question of the Rent Restrictions Acts I claim to have them treated as furniture the use of which is enjoyed by you under a contract distinct from the demise."

The fact that part of the most important of the fitments consists of bed-cupboards with bedsteads lends a certain

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(1) [1923] 2 K. B. 86, 93.

(4) [1902] A. C. 157.

(2) Ibid. 95.

(5) Ibid. 160.

(3) Ibid. 97.

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speciousness to the argument for the landlord. Who would dream of saying that a bedstead is not "furniture"? it is asked. My answer to this question is that we are dealing, not with the meaning of the word "furniture" in general, but with its meaning in a particular context, and that there is no more reason why a bedstead rising and falling on hinges fixed to the structure of the flat should not be a fixture than, for example, a hinged flap table fixed to the wall (a very common kind of fixture which no one, I imagine, would dream of calling "furniture" for the purpose of the Acts), the hinged lid of a lavatory, a tip-up wash-basin, or any similar hinged device. If the landlord chooses to instal hinged fixtures in his premises in this way, the fact that their functions might have been performed by loose articles is, in my opinion, nothing to the point. Indeed, the argument with regard to the bed-cupboards, when analysed, comes to nothing more than saying that, as bedsteads are normally loose articles, and, therefore, "furniture," it follows that they remain furniture even when they are fitted as part of a fixture. This argument, however, does not, in my opinion, bear examination. There is scarcely a fixture whose functions could not be performed by a loose article. A cupboard, a fixed wardrobe, a lavatory basin, a bath, a table, bookshelves, all can be either fixtures or movable. In the development of constructional technique many articles which formerly used to be provided as furniture by a tenant have become part of the fixed equipment provided by the landlord. In a modern hotel such a thing as a movable wardrobe is seldom seen—its place is taken by a "fitment." Such a fitment is made of wood, as are those in the present case. If it was made of breeze blocks bonded into the wall, no one would call it "furniture," but, according to the argument, if it is made of wood and fixed to the wall in the only effective way in which wood can be fixed, namely, by screws, it is, apparently, "furniture." Why this discrimination against a fixture made of wood should be made I fail to see. Indeed, this argument appears to me to be incapable of leading to any consistent result. It does not cover such a case as that of the kitchen dresser, which no one suggests is "furniture." It assumes that the list of fixtures or fittings, as distinguished from furniture, has in some way become closed, that only those things which our fathers were accustomed to expect in the houses which they took are to be regarded as fixtures or

fittings, and that any modern types of fixtures or fittings must be regarded as "furniture." Any such idea appears to me to be calculated to leave outside the Act many modern dwellings which ought to fall within it.

Two minor points remain to be mentioned. The "loose sideboard" was never, in fact, delivered, and it was argued that the tenant never had the use of it. The judge rightly rejected this argument. The rent clearly included a payment in respect of its use, and the tenant could have obtained it if he had pressed for it. The other point is that secondly mentioned at the beginning of this judgment, namely, that the judge did not have regard to the value to the tenant of what he held to be furniture. In particular, it was said that the tenant did not need the bedsteads as he brought bedsteads of his own, and, accordingly, that the bedsteads provided were of no value to him. The section does not direct the court to give effect to any consideration of this kind. The most that it must do is to have regard to the value to the tenant. I cannot assume that the judge omitted to do this. He was entitled to come to the conclusion on the facts that this particular element in his calculations was one which did not justify him in reducing the amount of rent which he held to be attributable to the use of the furniture. The mere fact that the tenant did not need to use the bedsteads does not mean that they were of no value to him. They formed part of the conveniences of the flat and were available for his use. I would allow the appeal and send the case back to the county court judge with a direction to ascertain whether the amount of rent which is fairly attributable to what I hold to be furniture forms a substantial portion of the whole rent, but, as my brethren take a different view, the appeal will be dismissed, with costs.

MACKINNON L.J. The only reason why I have any doubt about this case is because I find that the Master of the Rolls has come to a conclusion other than that which commends itself to me.

It was manifest from the evidence that if, when he took this flat, the tenant was a newly married man setting up house he would be spared a great many of the expenses of one in that position who takes an unfurnished dwelling. There was no need to provide beds for the couple. They were provided by the landlord and specified in the schedule. There

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C. A. was no need to provide a wardrobe for his clothes, or one for hers. A wardrobe for each was so provided and specified.
1943 There was no need to provide a dressing table or mirrors.
GRAY There was a dressing table with mirrors in the bathroom,
v. and there were other mirrors on the doors of the wardrobes.
FIDLER. There was no need for a sideboard in the bed-sitting room.
MacKinnon L.J. There was one in the schedule to the use of which he was entitled. Unless they had a fancy for extra rugs or carpets, there was no need to buy floor coverings, for linoleum was fitted and laid throughout the premises. In short, if I may use my own knowledge of the sort of equipment necessary for people starting residence in such a little flat, the only things that it would be essential to purchase by way of furniture would be a table, two chairs, household linen and blankets, cooking utensils, knives and plate and crockery. There was evidence, which the judge appears to have accepted, that all the flats in the building were similar, and similarly equipped, to this one, and that the cost of the actual building was some 12,600*l.*, and of the "landlord's fixtures and fittings" as expressed in the second schedule for all the flats some 11,000*l.* On this evidence it would seem that the judge had ample material on which he could find, as he did find, that this was "a dwelling-house bona fide let at a rent which includes payments 'in respect of use of furniture.'" From that finding the tenant can only appeal if he can establish that the judge was wrong in law. He seeks to do so on a contention that the judge has put a wrong construction on the word "furniture" in the section. It is not denied, of course, that beds and wardrobes are pieces of "furniture," but it is said that, to be "furniture" within the section, a bed or a wardrobe must be a movable article, whereas these beds and wardrobes, and most of the articles specified in the second schedule, are affixed by screws or other connexions to the walls or floors of the building, and, being so fixed and not movable in their normal user, they cannot be "furniture" within the section. It was first said that "furniture" must be "movable," and the definition of the Oxford English Dictionary, "Movable articles in a dwelling house, place of business, or a public building. (Now the prevailing sense) dating from 1573" was invoked. I cannot agree that to constitute furniture the articles notoriously within that description must be movable. It seems to me that it would be absurd to say that members of the Bar have the use of no furniture in this court, and that

my brethren and I have the use of no furniture except the chairs on which we are now sitting. Of course, articles of furniture are usually movable, and the definition of the Oxford English Dictionary is amply justified, but if a pedant had said to the late Dr. Murray: "Barristers in the Law" "Courts sit on very uncomfortable wooden seats with very "inconvenient desks in front of them. Those seats and desks "are fixed to the floor. Do you say those seats and desks "are not furniture?" I feel sure he would have replied that he did not. I, personally, have no doubt that it is no part of the proper definition of "furniture," in its ordinary meaning, that it *must* consist of movable articles. The briefest mental survey of my own house recalls many things that are fixed to the wall—mirrors, a bracket-clock, corner cupboards, many book-shelves, a medicine cupboard—which everyone would describe as articles of furniture. In houses I knew in my earlier days there were many articles of Victorian mahogany which were certainly not movable (except by a powerful crane), and to screw them to floor or wall would have been a superfluity, but they were certainly "furniture" though not movable by unaided human effort. A billiard table is only movable after it has been taken to pieces.

Then it was said that, if the present landlord made a will by which she bequeathed the building of this block of flats to A., and the furniture in them to B., the latter would only get the sideboard and standard lamp, but A. would get all the beds, wardrobes, etc., on the doctrine of their being affixed to the freehold. If the landlord did make such a will she might, of course, suffer the fate that has befallen so many testators, that of having their manifest intentions defeated. That it would be her manifest intention, as a user of ordinary English, that B. should have these beds and wardrobes, I should have no doubt, but I protest against the suggestion that, to construe a simple English word in an Act of Parliament, one should have recourse to its use in a hypothetical will of which another part, in the light of a highly technical rule of real property, throws doubt on the meaning of that simple English word. Then it was said that the structures I have spoken of as wardrobes—they are described in the second schedule as "fitted wardrobes"—were really only "cupboards," and cupboards are not furniture. "Cupboard" is a word of several meanings. No doubt, the common cupboard under the stairs is not a piece of furniture, nor is the cupboard which was once

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C. A. more commonly called a closet, but a cupboard fitted up for
 1943 clothes may just as well be called a wardrobe and is certainly
 GRAY a piece of furniture. Further, it was said that because these
 v. articles are fixed to the walls or floor they pass to the tenant
 FIDLER. under the demise of the flat, and the tenant does not enjoy
 MacKinnon L.J. their use under a contract for the use of chattels. Most of us
 have had experience of taking furnished houses for a term, but
 I have never known such an agreement to specify separately
 payment for the demised house and payment for the use of
 the furniture. Indeed, the section now under consideration
 obviously contemplates a single amount payable to the land-
 lord, and the judge has to inquire how much, if any, of that
 single payment by way of "rent" is "for the use of
 "furniture."

I think the word "furniture" in this section is to be construed
 as a common English word, or, as Bankes L.J. said in *Wilkes*
v. Goodwin (1), according to "the popular meaning of the
 "word." For articles to be "furniture" within that meaning
 I do not think it is essential that they shall be movable, and
 though, of course, articles of furniture are commonly movable,
 I do not think they pass out of the popular meaning of furniture
 because they are fixed by a nail or a screw to wall or floor.
 I think that the judge was right in treating these beds and
 wardrobes as articles which come within the ordinary and
 popular meaning of furniture. In strictness, perhaps, one
 should add "the ordinary or popular meaning of furniture
 "at the present day." For, no doubt, the ambit of the word
 has changed. The close stool of our ancestors is as obsolete
 as the triclinium. The round bath and its accompanying
 can of my undergraduate days is gone. No one would speak
 of their substitutes, the apparatus of the water closet, or the
 bath in the bathroom as "furniture." That, however, would
not be because they are fixed to floor or wall, but merely
 because they are not within the common or popular meaning
 of the word. A contrasted change may be that, whereas
 no one would include a fireplace within furniture, the electric
 fire which can stand anywhere, with a wire to a wall plug,
 probably would be called a piece of furniture, but, there again,
 that is not because it is movable, but because it is within the
 common or popular meaning.

In my view, therefore, the learned judge was right in the
 matter of construction. If so, there can be no question that

there was ample material on which he could find that the amount of rent fairly attributable to the use of these articles of furniture formed a substantial proportion of the whole rent within s. 10 of the Act of 1923. In the result, I think this appeal fails and should be dismissed.

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DU PARCQ L.J. I have had an opportunity of considering the judgments of the Master of the Rolls and MacKinnon L.J., and must now state my reasons for agreeing with the view taken by my brother MacKinnon. The principal question at issue is whether, for the purposes of the relevant sections, the word "furniture" must be read as necessarily excluding all fixtures, that ambiguous word being here used in the sense of "things affixed to the freehold." If it were to be so construed, the concluding words of the first proviso to s. 12, sub-s. 1, of the Act of 1920 might be paraphrased as follows: "A rent which includes payments in respect of . . . use "of furniture consisting of chattels not annexed to the realty." If Parliament had enacted the proviso in those terms, it would, I think, have been a matter for some surprise. The question whether chattels have been annexed to the realty is, indeed, often of great importance. As between heir and executor, life tenant and remainderman, or landlord and tenant, it may be a matter of moment, decisive of the rights of rival claimants to the possession and ownership of property. It is apparent, however, that the subject-matter of the section which we are considering has nothing to do with any such rights. The hereditament which the landlord lets and all the objects (to use a neutral word) with which it is equipped for the use or delectation of the tenant are indisputably the property of the landlord, and the tenant is at no time entitled to remove them from the demised premises. Indisputably, also, the tenant has the right, during the term, to possess, and to enjoy the use of, all those objects, whether they are annexed to the realty or not, and it matters nothing to him whether or not they have lost their character of chattels provided that he can conveniently use them. Apart from authority, therefore, it would seem to me to be plain that the question whether the articles which the learned judge held to be furniture were, or were not, fixtures, was irrelevant. MacKinnon L.J. has mentioned various fixtures which are commonly called furniture. I agree with him in thinking that they are properly so called.

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It was said there there is authority for the proposition that fixtures cannot be furniture. If that proposition had been authoritatively laid down, I should, of course, accept it, though I confess that I should do so with reluctance, because it would be contrary both to my own understanding of the English language and to what I believe to be the manifest intention of the legislature. I am satisfied, however, that such authority as is binding on us lays down no such proposition, but is rather to the contrary effect. It is true that in *Crane v. Cox* (1) words were used by two learned judges in the Divisional Court which seem to support it. That decision does not bind us, though I appreciate the force of the observation made by the Master of the Rolls that Parliament must be supposed to have known of the interpretation placed on its language by the Divisional Court and, with that knowledge, to have left the proviso unamended so far as this particular point is concerned. It must also be assumed, however, that Parliament did not fail to observe what was decided by this court, one month after the decision in *Crane v. Cox* (1), in *Wilkes v. Goodwin* (2). There the question was whether linoleum covering the floors of the rooms came within the description of "furniture." In the course of the arguments it was submitted, on the one hand, that linoleum, being fitted to the floors, was not furniture but "more like a fixture, "such as parquet," and, on the other hand, that, even if it was temporarily fixed to the floor by nails, that did not take it out of the category of movables, "for it would be removable "as between the landlord and tenant, just as much as a carpet." The court sent the case back to the county court in order that the judge might find certain facts. One of the questions of fact which he was asked to answer was: "whether the sixty-three square yards of linoleum in four rooms is 'furniture'?" (per Scrutton L.J. (3)). The court gave the learned judge some guidance, but said nothing to suggest that he ought to ascertain or consider whether or not the linoleum was annexed to the realty, and does not seem to have thought that point of any materiality. The arguments of counsel, to which I have just referred, lead me to think that the linoleum may well have been a fixture. The real importance of *Wilkes v. Goodwin* (2) is that it lays down the one test which a county court judge ought to apply. He is to consider whether the article in question comes within the popular meaning of the

(1) 92 L. J. (K. B.) 544. (2) [1923] 2 K. B. 86. (3) Ibid. 99.

word "furniture." This, said Bankes L.J., is "the only safe "guide to what constitutes 'furniture' within the meaning "of the Act." I respectfully agree, and I would add that the test so laid down in *Wilkes v. Goodwin* (1) does not demand, and indeed precludes, an inquiry whether or not the articles in question have become and must remain part of the realty. Scrutton L.J. said of *Crane v. Cox* (2) that he did not agree with the reasons for the decision which had been given by the court. He mentioned some of the reasons with which he disagreed. A further unsatisfactory reason which Scrutton L.J. did not mention was that given by Bailhache J. for holding (rightly, as I think) that linoleum might be said to be furniture, namely, that "it was put over the floor instead of a carpet." We are all agreed, I think, and it seems to me to be plain, that it is not right to call an article a piece of furniture merely because it replaces, or is a substitute for, something which is furniture. As MacKinnon L.J. has said, we do not call the bath in a bathroom a piece of furniture, although it replaces something, once in more common use, which might aptly have been so described. It is unnecessary to comment further on *Crane v. Cox* (2). If it is to be treated as deciding that what is properly called a fixture cannot also properly be called furniture, I regard it as inconsistent with the general principle laid down in *Wilkes v. Goodwin* (1) and as impliedly overruled by that decision. For myself, I hope that county court judges, in cases of this kind, will never again think it their duty to decide as to each article whether it is a "fixture" or might, if it belonged to a tenant, be said to be removable as a "tenant's fixture." The word fixture is often loosely used, and not always with the same meaning. Its introduction into cases of this class serves only to confuse what should be a comparatively simple investigation. The question to be decided is not one of law. The word furniture has no esoteric significance. Expert evidence is not necessary to enlighten the judge as to its meaning, nor ought he to be influenced by what other judges have decided about other articles. Decisions on questions of fact do not bind other tribunals, and, if anyone chooses to report them, their citation ought not to be encouraged. The judge is, of course, entitled to consult a dictionary if he thinks it helpful to do so, but in the end he must answer as a juryman would, the question: Which of these articles ought to be described, in a popular sense, as

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(1) [1923] 2 K. B. 86, 89.

(2) 92 L. J. (K. B.) 544.

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furniture? If he applies his mind to that question, his decision can be assailed in this court only on the ground that it involves a finding to which, on the evidence, no reasonable man could come. In the present case the learned judge did address his mind to this question of fact, and, although he was induced to pay undue attention to the different question whether, if the articles had been annexed to the realty, not by the lessor but by a tenant, they would have been "tenant's fixtures," I am satisfied that (save possibly as to one article to which I shall refer later) the tenant's case was not thereby prejudiced. A definition from the Oxford Dictionary was cited before the judge, and stress was laid, as it was at the bar in this court, on the word "movable" which that definition contains. It was suggested that what was fixed could not be movable, so that, if one applied the test of popular meaning, the conclusion that fixtures could not be furniture was reached by another path. I would observe, however, that movable only means "capable of being moved." An apple growing in an orchard is movable. The proposition that no article which is fixed or annexed to the structure of a building is capable of being moved is not one to which any juryman would be likely to assent except under duress. In 1750 Lord Hardwicke said of beds that they were sometimes "fastened to the ceiling with ropes, nay, frequently nailed, and yet no doubt but that "they may be removed": see *Ex parte Quincey* (1). The Lord Chancellor was speaking, of course, of the right of the tenant, but it is manifestly true as a physical fact that many things which the ordinary man calls furniture are fixed to a structure but are still capable of being moved. If in 1750 an enterprising thief had been able to unfasten and to carry away the bed of a householder he might well have taken the point, if he had been accused of stealing it, that his act was no felony, because the asportation had immediately followed on the severance, so that the bed still savoured of the realty and could not be the subject of larceny. That would have been a good plea and might have saved him from hanging. If, however, it had been necessary for him to convince a jury that the bed which he was carrying away was not furniture "in a popular sense" because it was not movable, he would, I think, have had short shrift. The conclusive answer would have been that he himself had proved in the most practical manner that it was movable, since he had moved it. If a thing

(1) (1750) 1 Atkyns 477, 478.

which would ordinarily be regarded as an article of furniture has been attached to a structure, and can be detached and moved and still be recognizable as the same article of furniture, then, in my opinion, furniture it is. The word "movable" is necessary to the definition only because the ordinary man does not describe as furniture things which are, in fact, part of the structure of the house (e.g., most if not all mantelpieces). His reason is not that they are "fixtures," but that they really are part of the building. The distinction between fixtures and parts of the structure is usefully drawn in *Boswell v. Crucible Steel Co.* (1). When Scrutton L.J. referred to questions of fact which may arise under wills, he may have had in mind the decision of the Court of King's Bench in *Birch v. Dawson* (2). There the question was whether a looking-glass nailed to a chimney piece and a bookcase screwed to the wall, passed under a bequest of "fixed furniture." The court was unanimously of opinion that they did. Taunton J. put the point concisely in an interrogative form. "Are not looking-glasses furniture?" he asked, "and are not these looking-glasses fixed? If so, "are they not fixed furniture?" It does not seem to have occurred to any of the judges that the expression "fixed furniture" was, as the tenant's argument here would suggest, a contradiction in terms. The Court of King's Bench appears to have thought, as I humbly think, that the testator had used good and plain English.

If the judge's decision can be supported as a justifiable finding of facts, without error in law, then it seems to me that the question which finally falls to be decided can be simply answered. That question is: Did the rent which Mr. Fidler agreed to pay include payments in respect of the use of furniture? The agreement certainly gave him the right to enjoy the use of the articles enumerated by the judge. Nobody doubts that he was paying for the use of them. The payment that he made for them must necessarily have been included in the rent, because (apart from the sum of 6*l.* paid for a separate consideration) he paid nothing to the landlord except a "yearly rent of 78*l.*"

The tenant further relied on an argument founded on *Burns-Wallace v. Hardingham* (3) to which Scrutton L.J. referred in his judgment in *Wilkes v. Goodwin* (4). In that case what was let was, as the lease itself expressly stated, an unfurnished

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(1) [1925] 1 K. B. 119.

(2) (1834) 2 Ad. & E. 37.

(3) Unrep.

(4) [1923] 2 K. B. 86.

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house, and it was, therefore, impossible for the landlord to say that the tenant was paying for the use of furniture, even though he had left in the house some articles which might have been so described. In the present case furniture is expressly mentioned in the tenancy agreement. A list of the "furniture fittings and fixtures" (see clause 2 (3.) of the agreement) is set out in the second schedule, and this list contains at least two articles which, according to the tenant's own admission, are furniture. In my opinion, the tenant is not assisted either by the unreported decision or the observations made on it by Scrutton L.J. With respect, I do not think that the law permits a landlord and tenant to alter their statutory rights and liabilities by agreeing between themselves either that what is not, in fact, furniture shall be deemed to be furniture for the purposes of the Act, or that what is furniture shall be deemed not to be furniture for the purposes of the Act. If the learned judge's findings of fact are considered in the light of what I understand to be the true rule of construction I am of opinion that, with one possible exception, they are reasonable and justifiable. The exception is the hot-water roller, or rail, in the bathroom. I doubt if the judge would have called this furniture if he had not regarded it as a "tenant's fixture" which the hypothetical tenant who had notionally fixed it to the hereditament would have been permitted to remove. If I am right, this is an illustration of the trouble which may be caused by unnecessarily importing a fiction into a case in which the court is only concerned with facts. It is hardly necessary to add that many "tenant's fixtures" (for instance, wainscoting) are not furniture. This doubt cannot, however, affect my decision. The rail or roller is of very small value, and the judge tells us that he would regard the annual value of the furniture as still substantial even if his list were very considerably reduced. On the main point, therefore, the tenant in my judgment fails.

With regard to the subsidiary points on which the Master of the Rolls takes a view adverse to the tenant, I am happy to find myself in complete agreement with my Lord. As the tenant relied on a passage in my judgment in *Brown v. Robins* (1) I will add a few words to what the Master of the Rolls has said with reference to the sideboard. I do not wish to retract, or to modify, anything which I said in that case. There the tenancy agreement provided that the tenant might call for certain furniture to be delivered to him if he chose to do so.

(1) [1943] W. N. 93.

He had not, in fact, done so, and that furniture had never been delivered. In those circumstances the tenant could not be said to have paid for the use of it. In the present case it seems manifest that the rent paid by the tenant included a payment for the use of the sideboard. He had a right, without demand, to the immediate possession of the sideboard from the beginning of the tenancy. It was only through inadvertence that it was not placed in the flat. In my opinion, nothing that is being decided in this case conflicts with what was laid down in *Brown v. Robins* (1). For these reasons I am of opinion that the appeal should be dismissed with costs.

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Appeal dismissed.

Solicitors: *W. G. Street & Co.; Lea & Lea.*

(1) [1943] W. N. 93.

H. C. G.

STANLEY v. INLAND REVENUE COMMISSIONERS.

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 July 26, 28.

Revenue—Income tax—Trust—Accumulation of income during minority—Liability to sur-tax—Trustee Act, 1925 (15 Geo. 5, c. 19), s. 31.

The appellant had a vested interest as tenant for life of certain estates, the income whereof accumulated in the hands of trustees during the four years of his minority. On his attaining his majority, the trustees paid the accumulated funds to him. The Crown claimed sur-tax thereon in respect of each such year of his minority:—

Held, that, notwithstanding the provisions of s. 31, sub-s. 2, of the Trustee Act, 1925 (which enacts that, in the event of the death, before attaining twenty-one years, of an infant entitled to such a vested interest, the trustees shall hold the accumulated funds as an accretion to capital instead, as heretofore, in trust for the infant's personal representatives), the income had accrued to the appellant during each of such years, although only payable at his majority, and was, therefore, chargeable to tax.

CASE stated by Special Commissioners of Income Tax.

At a meeting of the commissioners on October 8, 1941, the appellant, the Hon. Lyulph H. V. O. Stanley, appealed against four additional assessments to sur-tax for the years ended April 5, 1934, 1935, 1936 and 1937, in the sums of 3500*l.*,

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4000*l.*, 4000*l.* and 2750*l.* respectively. Under a deed of re-settlement, dated April 21, 1904, the fourth Baron Stanley of Alderley became the tenant for life of certain real estates in Wales. He died on March 18, 1925, and his eldest son, afterwards fifth baron, became life tenant of the estates with a general power of appointment. By his will, dated June 2, 1926, the fifth baron, who died on August 22, 1931, appointed the appellant tenant for life of the estates. At the time of his father's death the appellant was an infant, and during his infancy the trustees under the will accumulated such portion of the income of the estates as was not expended on his maintenance. It was admitted that the appellant took a vested life interest in the estates, and that, on attaining his majority on October 23, 1938, he became entitled to the accumulations absolutely, pursuant to s. 31, sub-s. 2, of the Trustee Act, 1925 (1). The commissioners held, with considerable doubt, that the trustees were in the position of bankers for the appellant so that the income was his income year by year as it accrued, and they, therefore, dismissed the appeal.

Scrimgeour for the appellant. The intended effect of s. 31 of the Trustee Act, 1925, was to assimilate the law as to contingent and vested interests. Before the Act the accumulations would, in the event of the death of the infant before attaining his majority, have vested in his personal representatives if the interest in the life estate was a vested interest. If, however, the interest was contingent, it would not have so vested, because it would never have vested in the infant. Sect. 31 of the Act altered the law and thereafter it could not be said that the accumulations belonged to the infant in any one of the years of minority because it could not then be said

(1) Trustee Act, 1925, s. 31, sub-s. 2: "During the infancy
"of any such person, if his interest
"so long continues, the trustees
"shall accumulate all the residue
"of [the trust] income in the way
"of compound interest by investing the same and the resulting
"income thereof from time to time
"in authorised investments, and
"shall hold those accumulations as
"follows:" (1.) If any such person
"(a) attains the age of twenty-one

"years . . . and his interest in
"such income during his infancy
" . . . is a vested interest . . . the
"trustees shall hold the accumulations in trust for such person
"absolutely . . . and (ii.) In any
"other case the trustees shall,
"notwithstanding that such person had a vested interest in such
"income, hold the accumulations
"as an accretion to the capital
"of the property from which such
"accumulations arose. . . ."

that he would ever attain his majority and thus become entitled to them. On attaining his majority the appellant received the accumulations as capital which is not liable to the tax. They never, as income, had a beneficial home with him. Only that part of the income which has been devoted to his maintenance is taxable. [*Inland Revenue Commissioners v. Longford (Countess of)* (1) was referred to.]

Sir D. Maxwell Fyfe S.-G., J. H. Stamp and R. P. Hills for the Crown. The income from the estates belonged absolutely to the appellant in each year, although it did not come into possession until his majority: *Dale v. Mitcalfe* per Sargant L.J. (2) That case makes clear the distinction between vested and contingent interests. Sect. 31, sub-s. 2 (i.) (a), of the Act, carefully preserves that distinction and maintains the conception of the vested interest and all its legal consequences. All that the sub-section does is to alter the destination of the accumulated funds on the death of the infant before attaining his majority, when they can no longer benefit him. It still leaves him the absolute owner of the funds as they accrue during his life. An infant is liable in tort, and to satisfy a judgment against him a receiver of these funds could have been appointed by way of equitable execution. In fact, the appellant did attain his majority and the case must be contemplated in the light of facts as they are: see per Greene M.R. in *Smart v. Lincolnshire Sugar Co.* (3) and Lord Macmillan in *Lincolnshire Sugar Co. v. Smart* (4). [*In re Bradberry* (5) was also referred to.]

Scrimgeour in reply. The appointment of a receiver by way of equitable execution could not enlarge the infant's interest.

Cur. adv. vult.

July 28. MACNAGHTEN J. read the following judgment. On attaining his majority, the appellant became entitled, pursuant to s. 31, sub-s. 2, of the Trustee Act, 1925, which came into force on January 1, 1926, to the accumulations of the income absolutely. The four additional assessments to sur-tax, which are the subject of this appeal, were made on the footing that during the minority of the appellant the income of the settled estates belonged to him and must be

(1) [1928] A. C. 252.

(4) [1937] A. C. 697, 705.

(2) [1928] 1 K. B. 383, 393.

(5) [1943] Ch. 35, 42.

(3) (1935) 20 T. C. 643, 665.

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treated as his income for the purposes of income tax and sur-tax. This would undoubtedly have been so before the Trustee Act, 1925, came into force, and if the appellant had died during his minority the accumulations of income would have passed to his next of kin under an intestacy, but the Trustee Act, 1925, effected a change of the law in that respect. By s. 31, sub-s. 1, power is given to trustees "where any property is "held by trustees in trust for any person for any interest "whatsoever, whether vested or contingent," to apply the income for his maintenance and benefit. Sub-sect. 2 provides: "During the infancy of any such person . . . the "trustees shall accumulate all the residue of that income in "the way of compound interest by investing the same and "the resulting income thereof from time to time in authorised "investments," and shall hold those accumulations, in the event of the infant not attaining the age of twenty-one years, "as an accretion to the capital of the property from which "such accumulations arose, and as one fund with such capital "for all purposes, and so that, if such property is settled land, "such accumulations shall be held upon the same trusts as if "the same were capital money arising therefrom." Mr. Scrimgeour, for the appellant, contended that the effect of these provisions is that the vested interest of a minor is assimilated to the contingent interest of a minor, and, therefore, during the minority of an infant with a vested interest, he is no longer to be regarded as entitled to the income of the property, but is to be regarded as a person who is only entitled to the income of the property in the event of his attaining the age of twenty-one. For the Crown it was argued that the statute does not purport to make any change in the law, that the tenant for life of settled estates who is under age remains, notwithstanding s. 31 of the Trustee Act, 1925, the owner of the estates, and that the income of the property belongs to him. All that the Act has done is to provide that, in the case of an infant with a vested interest in the property dying under age, the accumulations of the income should go as an accretion to the capital of the trust, instead of going, as they did before January 1, 1926, to the next of kin of the infant under an intestacy. In my opinion, the contention of the Crown is correct. I think the appellant during his minority was entitled, as tenant for life of the settled estates, to the income of those estates. Although, if he had died before attaining his majority, the accumulations in that event would have

been added to the capital of the trust, nevertheless they were during his minority, unless and until he died under the age of twenty-one, still his property, and, therefore, could properly be treated as his income for the purposes of the Income Tax Acts. Therefore, the appeal fails and must be dismissed with costs.

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Solicitors for appellant : *Maples, Teesdale & Co.*

Solicitor for Crown : *Solicitor of Inland Revenue.*

W. L. L. B.

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Revenue—Estate duty—" Money received under policy of assurance "—Policy " wholly kept up " by deceased for benefit of donee—Assignment of policies and investments to trustees for benefit of settlor's son—Direction for payment of premiums out of income from investments—Customs and Inland Revenue Act, 1889 (52 Vict. c. 7), s. 11, sub-s. 1—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2, sub-s. 1 (c).

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The settlor assigned two policies of assurance which he had effected on his own life to trustees for the benefit of his son and others together with certain securities from the income of which he directed the trustees to pay the premiums on the policies. On the settlor's death the Crown claimed estate duty on the amount of the policy moneys which had been paid to the trustees of the settlements, it being contended that the policies had been " wholly kept up " by the settlor " for the benefit of a donee " within the meaning of s. 11, sub-s. 1, of the Customs and Inland Revenue Act, 1889, with the result that the policy moneys were property " passing on the death of the deceased " within s. 2, sub-s. 1 (c), of the Finance Act, 1894 :—

Held (by Scott and MacKinnon L.JJ., Luxmoore L.J. dissentiente), that the policies were " wholly kept up " by the settlor " for the benefit of a donee " within s. 11, sub-s. 1, of the Act of 1889, and, therefore, that the estate duty claimed was payable.

APPEAL from Wrottesley J.

By the combined effect of a deed of settlement of August 15, 1922, executed by the first Viscount Devonport; a deed of appointment executed by him thereunder on May 15, 1930, in favour of his eldest son, the second viscount; and a further deed of settlement of the same date executed by the second viscount, to which the first viscount and the trustees of the

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earlier settlement were parties; there were assigned to trustees for the benefit of the second viscount and others two policies of insurance on the life of the first viscount which had been taken out and maintained by him before the date of the deed of settlement of August 15, 1922, together with certain securities out of the income from which the trustees were directed to pay the premiums payable in respect of the policies. The first viscount died on September 5, 1934, and after his death the trustees received under and by virtue of the two policies of insurance the total sum of 78,675*l.* By an English information filed by the Attorney-General, the Crown claimed that estate duty was payable on this sum on the ground that the policies were "wholly kept up" by the first viscount "for the benefit of a donee," namely, the beneficiaries under the settlements, within the meaning of s. 11 of the Customs and Inland Revenue Act, 1889, and, consequently, by virtue of s. 2, sub-s. 1 (c), of the Finance Act, 1894 (1), were "property passing on the death of the deceased" in respect of which estate duty was payable. Wrottesley J. held that the policies were "wholly kept up" by the first viscount and that estate duty was payable on their capital value. The trustees appealed.

King K.C. and *Wilfrid Hunt* for the trustees. The decision of Wrottesley J. was wrong. The policies were not "wholly kept up" by the first viscount within the meaning of s. 11,

(1) Finance Act, 1894, s. 2, sub-s. 1: "Property passing on the death of the deceased shall be deemed to include the property following, that is to say:—
". . . (c) Property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom"

Customs and Inland Revenue Act, 1889, s. 11, sub-s. 1: "Sub-section 2 of s. 38 of the Customs and Inland Revenue Act, 1881, is hereby amended, as follows:—
". . . The charge under the said section shall extend to money received under a policy of assurance effected by any person dying on or after June 1, 1889, on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit."

sub-s. 1 of the Act of 1889. "Kept up" and "paid" in the sub-section are synonymous terms and mean kept up by payments of premiums made personally by the deceased, and here the settlor never paid a farthing towards the upkeep of the policies after they had been assigned to the trustees. He merely furnished the means by which the premiums were paid by the trustees. The words of s. 11, sub-s. 1, are clear and simple. The stress which is laid by the Crown on the words "kept up" in the earlier part of the sub-section should be put on the words "paid by him" in the later part. Where the policy has been partly kept up by the deceased, the sub-section speaks of the "premiums paid by him" and there is no reason why the meaning should be different where the policy is "wholly kept up" by the deceased. In both cases personal payment is meant.

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Sir Donald Somervell A.-G., J. H. Stamp and R. P. Hills for the Crown. The policies were "wholly kept up" by the deceased within s. 11, sub-s. 1. In construing that sub-section regard must be had to the substance rather than to the form of the transactions with which it deals: *Braybrooke v. Attorney-General* (1). Here the substance was that the premiums were paid by the first viscount who had provided the fund out of which they were to be paid after the policies had been assigned to the trustees. In *Inland Revenue v. Scott's Trustees* (2) the Lord President in circumstances similar to those of the present case said: "It appears to me exactly the same as if 'he himself had paid out of his own funds during all those years all those premiums upon his own policies. They were 'as much paid by him when they were paid indirectly by 'virtue of his direction under the trust deed as if they had been 'paid by his own cheques at the time.' If there is any ambiguity in s. 11, sub-s. 1, the wider phrase "keep up" in the earlier part, should control the word "paid" in the later part where it is only used in the subsidiary provision dealing with the question of the apportionment of the duty payable between the settlor and the donee.

June 10. The following judgments were read.

SCOTT L.J. I agree with the conclusion arrived at by Wrottesley J., but it is necessary to deal with the arguments of Mr. King and Mr. Hunt, and still more with the dissentient

(1) (1860) 9 H. L. C. 150.

(2) 1918 S. C. 720, 725.

C. A. judgment of Luxmoore L.J., which I have had the advantage of considering.

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The issue is whether the first Lord Devonport, who had previously kept up two policies on his own life by paying the premiums, still continued to keep them up after he assigned the policies to trustees for his eldest son and others together with investments of which the income was sufficient to pay the premiums and which was thereafter in fact used by the trustees for that purpose. The case depends on the true interpretation of the last paragraph of s. 11, sub-s. 1, of the Customs and Inland Revenue Act, 1889, as amended by s. 2, sub-s. 1 (c), of the Finance Act, 1894, of which the learned judge has in his judgment conveniently quoted in extenso the resultant wording. It is as follows: "The charge under the said section shall extend to money received under a policy of assurance effected by any person dying on or after August 1, 1894, on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit."

The question turns on the meaning of the phrase "keep up." In my opinion, that phrase covers what Lord Devonport, in fact, did and is unambiguous in that sense, but, as Luxmoore L.J. differs and thinks it is limited to payment of premiums direct out of his own pocket as and when they fell due, I will assume that it is ambiguous and state my reasons for construing it in a wider sense which includes causing to be kept up by payment of premiums as well as paying them directly. For this purpose it is relevant to follow the steps in the statutory development of death duties, beginning with s. 38 of the Customs and Inland Revenue Act, 1881. There are various points in the relevant enactments which call for consideration. (1.) The duty was imposed by that Act primarily on property "taken" under a probate or letters of administration, and was made payable by the personal representative who took the property. Estate duty was made similarly payable under s. 6 of the Finance Act, 1894. (2.) The scope of the charge was extended by s. 38 of the Act so as to include (a) *donationes mortis causa* and (b) gifts *inter vivos* purporting to operate as an immediate gift and made less than three months before the death (enlarged to twelve months by s. 11 of the Act of 1889, and to three years by s. 59

of the Finance (1909-1910) Act of 1910). (3.) By the first paragraph of s. 11, sub-s. 1, of the Act of 1889, all gifts *when-ever made*, i.e., however long before the death, were brought into charge unless "bona fide possession and enjoyment" by the "donee" was "assumed immediately" by the donee. (4.) The last paragraph of s. 11, sub-s. 1, of the Act of 1889 enlarges the ambit of the charge to death duty so as to bring within its scope money received in respect of a life policy where it has been effected in the name of, or assigned to, a donee, the duty being made chargeable on the whole of the money if the policy has been wholly "kept up" by the assured, but only on a proportionate part not so wholly kept up, e.g., if the donee had paid part of the premiums. It is to be noted that this liability is not, as in the case of other "bona fide" gifts *inter vivos*, made to depend on the length of time before the death that the gift was made. (5.) In all these enlargements of the scope of death duties it is obvious that Parliament's intention was to forestall and prevent attempts by the living owner to save his estate from the tax-gatherer's net upon his death. In the Acts of 1881 and 1889, as in 1894, Parliament was concerned with the substantial question inherent in the problem of all death duties, namely, what property ought to be regarded from the fiscal angle as passing on the death of any deceased person? It was endeavouring to find reasonably just criteria to prevent avoidance of tax liability. The case of gifts *mortis causa* was the most obvious instance of such avoidance. From that it was an easy extension to include a gift made very shortly before the death without making intention to avoid in any sense the test. Hence the three months of the Act of 1881 extended to twelve months in 1889 and to three years in 1910.

For taxation purposes a life policy is a special kind of property, and, where during its currency it has been made the subject of a gift, it gives rise to a special problem. As the surrender value during the life may, in fact, have been created partly by the donor and partly by the donee, so each of them may fairly be regarded as having a proprietary share in its final value at the moment before the falling in of the insured life. Where that is the case, it is fair for the Inland Revenue to abstain from claiming death duty on that part of the value which has been created by the donee, and has already before the death, therefore, metaphorically, "belonged to" the donee, but the fairness of that abstention depends on the assumed

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fact that the donee has put his own money into "the investment" (as Hamilton J. called it in *Gould v. Curtis* (1)). In that event it may truly be said that *his* investment does not pass on the death. Conversely, so far as the investment has not been made to any extent his own by his having put his money into it, the revenue ought not to lose the death duty on that part of the investment which is not so made his. If that be the fair dividing line between what passes and what does not pass, it cannot make any difference whether the deceased used direct or indirect means to maintain his part of the investment, i.e., "to keep up the policy." If, contrary to my opinion, "keep up" be ambiguous, these considerations may help to show what was the meaning of "keep up" as used by Parliament.

The language used in s. 11, sub-s. 1, is popular and not technical, just as 'popular' as is the basic provision of the Act of 1894 about "property passing on the death." 'Keeping up' is a phrase of the market-place, not of the law, and in its context in the sub-section it may, I think, be paraphrased as "taking effective steps to prevent the policy lapsing," of which, no doubt, paying the premiums is an essential.

Mr. King argued that any such popular interpretation of that phrase (the correctness of which, apart from its context, he did not dispute) is excluded by the later words "premiums paid by him," from which the phrase "keep up," he said, must take its colour. That the one may colour the other, I concede, but the wider phrase "keep up" is the key to the enactment. It expresses the dominant idea, and must, I think, in the context control, and so colour, the narrower word "pay" which appears only in the ancillary provision about apportionment between donor and donee. In addition, the reference to payment of premiums contained in the last two lines of the paragraph is machinery for assessing quantum, not for creating the charge which has already been imposed in the earlier part of the paragraph. So construed, the sub-section propounds a plain test of chargeability, using language which will be understood by the plain man. In my opinion, it is only if the person who on the death gets the policy money has really kept up the policy, that it can in any real sense be said that the policy money does not "pass" on the death. By freeing the policy from duty to the extent to which the donee has kept it up and leaving the estate assessable

in respect of the portion of the value contributed by the deceased, a fair apportionment is achieved. The trust was the means by which Lord Devonport ensured that his purpose of keeping up the policy out of his own pocket "for the benefit of a donee" (i.e., all the beneficiaries) would be achieved. I can see no practical reason why it should matter whether the donor keeps it up directly by himself paying the premium or indirectly by the machinery of a trust. Had Parliament intended to treat an assignment of a policy as a mere gift and nothing else I should have expected it to have expressly mentioned policies in the category of mere gifts. It would have been easy to say so, but Parliament dealt with a life policy differently. The appeal, in my opinion, must be dismissed with costs.

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MACKINNON L.J. Having read the judgment written by Scott L.J. I was prepared to say that I agreed with it, and did not wish to add my own reasons for so doing, but, having since read the judgment written by Luxmoore L.J., it is, unhappily, necessary for me to state my reasons shortly.

The question depends on the proper meaning of the words "kept up by him" in the section. Can it be said that these policies were "wholly kept up" by the first viscount within that provision? "Kept up" is not a term of legal art. It is vague and popular language. In vague and popular language who "kept up" these policies? As it is popular language that question should, perhaps, be addressed to the man on the Clapham omnibus, and I feel sure that his answer would be: "The first viscount kept them up," if he had got to understand that all the premiums were paid out of trust funds provided for that purpose by the first viscount. The contrary view of Luxmoore L.J. rests on the light which he thinks is provided by the following words: "or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him." As "partially kept up" is used with reference to "in proportion to the premiums paid by him" his view is that "keeping up" means "paying premiums for" and not any looser phrase such as "providing the premiums for." For myself, I do not see why the loose phrase "kept up" is to be explained or defined by the more exact term "paid" any more than the exactness of the term "paid" is to be explained or enlarged by the earlier phrase "kept up." The dominant provision is "where the policy is wholly kept up."

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The subordinate provision, where the policy is not "wholly kept up," but only partially, is "in proportion to the premiums paid by him." Reading the whole sentence, I think the later word "paid," in itself precise, ought to be reduced to the less precise meaning involved in the dominant provision "kept up." The draftsman could not very well use any form of the phrase "keep up" in the passage beginning "in proportion to the premiums," but, having regard to his previous use of "kept up," I think "paid" may well be taken to mean no more than "provided." Alternatively, his purpose, as I interpret it, might have been achieved by the rather clumsy words "in proportion to the extent to which the policy was kept up by him." For these reasons I agree with Scott L.J. that the appeal fails.

LUXMOORE L.J. (read by MACKINNON L.J.). I am unable to agree with the conclusion at which my brethren have arrived. The question to be decided is whether estate duty is payable in respect of the whole or any and what interests in moneys secured by two policies of insurance effected at some date before August 15, 1922, by the first Viscount Devonport on his own life. [His Lordship stated the effect of the settlements of August 15, 1922, and May 15, 1930, and the deed of appointment of May 15, 1930, and the facts, and continued:] The claim of the Crown to estate duty on the capital of the policy moneys is based on the provisions of s. 2, sub-s. 1 (c), of the Finance Act, 1894, which provides that property passing on the death of the first viscount shall be deemed to include "property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by "s. 11 of the Customs and Inland Revenue Act, 1889" Section 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, making the omissions above referred to and treating it as re-enacted by the Finance Act, 1894, omitting all immaterial words, reads as follows: "The charge under the said section shall extend to money received under a policy of assurance effected by any person dying after August 1, 1894, on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit."

The answer, therefore, to the question whether estate duty is payable on the whole of the policy moneys must depend on the meaning of the phrase "where the policy is wholly kept up" by the deceased for the benefit of a donee. Does the phrase mean that, in order to incur liability to estate duty, the deceased must have paid the premiums himself, or is it sufficient that the deceased should have provided for the payment of the premiums, whether by the setting up of a trust fund for that purpose or by making an absolute gift to the donee of a sum sufficient to pay the premiums? The key to the solution appears to me to be found in the latter part of the clause—"or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit." Here it seems to me that the phrase "partially kept up" is used by reference to the phrase "in proportion to the premiums paid by him" and is to be explained by it. It is true that the first viscount made a provision for the payment of future premiums by means of funds which he transferred to the trustees when the settlement was made but in which he retained no beneficial interest whatsoever. From the date of the settlement the funds became the property of the beneficiaries, and, although over-riding trusts were declared for payment of the premiums, there was no agreement to that effect enforceable by the first viscount. What he did was to state the trusts which were to attach to the funds which he had already placed in the hands of the trustees. The funds were no longer the property of the first viscount. They belonged in equity to the beneficiaries who alone could compel the trustees to carry out the trusts. The payment by the trustees of the premiums was not made by them in any sense as agents for the first viscount and cannot properly be described as being payments made on the first viscount's behalf. It is true that the words "kept up by him" are not words of art, and it may be that, if the latter part of s. 11, sub-s. 1, to which I have referred, were absent, they might be said in popular language to cover the case where a provision was made by the donor of a policy of a fund to meet the premiums as and when they fell due, but the latter part of the sub-section refers to the payment of some of the premiums by the donor as constituting the partial keeping up of the policy. In other words, the sub-section itself explains the phrase "kept up" as synonymous with the payment of premiums.

The learned judge seems to have treated the payments by

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the trustees of the premiums as resting in contract or made by them as agents for the first viscount, for he asks himself the question: "Can it be said that Lord Devonport was at any "time guilty of a breach of his contract?" To any such claim his answer would be "Qui facit per alium facit per se," and he continues by referring to a remark of the Lord President in the Court of Session in Scotland reported in *Inland Revenue v. Scott's Trustees* (1), where he says: "It appears to me "exactly the same as if he himself had paid out of his own funds "during all those years all those premiums upon his four "policies." In that case the owner of the four policies settled them and at the same time settled a fund to meet the premiums as they fell due. At the time of that decision it was not appreciated that there was any substantial difference between s. 2, sub-s. 1 (d), of the Finance Act, 1894, and s. 2, sub-s. 1 (c), and it was thought that it was sufficient to attract estate duty on the whole of the policy moneys if it could be found that the deceased had provided the moneys for keeping up the policies.

I am unable to find any real ambiguity in the language to be considered. As I have already said, in my opinion, the key word of the charging provision is the word "paid." In the sub-section, the method of keeping up a policy is expressed to be by payment of the premiums. On the true construction of the sub-section, "partially kept up" by the deceased must be by payment of some of the premiums by him. The phrase "wholly kept up" in the earlier part of the sub-section cannot be construed differently. On this aspect of the case the question is not who provided the funds for keeping up the policies. As a matter of history, the funds out of whose income the premiums were paid belonged to the first viscount. He parted with them when he made the settlement. On its execution the funds became in law the property of the trustees who were answerable to the beneficiaries, the owners in equity who alone could call the trustees to account. The first viscount was not a beneficiary and had no such right. There was not even a possible resulting trust in his favour. Mr. King, on behalf of the trustees, admitted that his clients were liable to estate duty under s. 2, sub-s. 1 (d), on the life interest of the present viscount under the settlement in the policy moneys, but not on the capital, and there is no necessity to deal with this aspect of the case. For these reasons I would allow the appeal and direct the consequential alterations in the order of

the learned judge to give effect to the appellants' notice of appeal.

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Appeal dismissed.

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Solicitors for trustees: *Waterhouse & Co.*

Solicitor for the Crown: *Solicitor of Inland Revenue.*

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Negligence—Master and servant—Factory—Repair of ship in wet dock—Fatal injury to workman—Liability of employers—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 67), ss. 60, 106, 159—Shipbuilding Regulations, 1931 (St. R. & O. 1931, No. 133), regs. 1, 10, 42.

The obligations cast by the Shipbuilding Regulations, 1931, on the occupier of a factory (including a shipbuilding yard) and on a person undertaking the work of repair of a ship in public dry dock have not been extended by ss. 60, 106 and 159 of the Factories Act, 1937, so as to impose the duty of complying with the regulations on persons undertaking the work of repair of a ship in a harbour or wet dock.

The defendants undertook the wiring of the 'tween deck of a ship while she was lying in a wet dock. The hatchway in the 'tween deck was left uncovered, and a number of articles, including a fender, a propeller and two piles of hatch covers, were lying round the hatchway, leaving little space for persons to pass. The defendants' foreman considered the place was dangerous for the workmen and asked that the hatch covers should be put on, but the chief officer of the ship had the covers put on only two out of the eight compartments of the hatchway. The defendants' foreman did not insist on the hatchway being completely covered, neither did he put the covers on himself, nor did he rig up a lifeline round the hatchway. Owing to rain the ship's officers had the covers put on the hatchway in the main deck immediately overhead, thereby excluding all daylight from the 'tween deck. The only artificial light provided was so placed as to throw light on the work on which the workmen were engaged, the rest of the deck being in darkness. The plaintiff's husband, who was employed by the defendants on the job, returning to his work after dinner, tripped over the pile of hatch covers, fell into the hold and was killed. The plaintiff brought an action against the defendants under the Law Reform (Miscellaneous Provisions) Act, 1934, to recover damages in respect of the death of her husband, for breach of the Shipbuilding Regulations, 1931, and, alternatively, at common law:—

Held, that the Shipbuilding Regulations, 1931, did not impose

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any duty on the defendants as the work of repair was being carried out by them in a ship in a wet dock, but that the defendants were liable to the plaintiff at common law for the negligence of their foreman in not taking reasonable precautions for the safety of their workmen and for not providing a safe system of working.

ACTION tried by Atkinson J.

The plaintiff, Gwendoline Winifred Garcia, who was suing as the administratrix of the estate of her husband, Arthur William Garcia, brought this action against her husband's employers, Harland & Wolff, Ltd., claiming damages under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the death of her husband. In August, 1941, the defendants undertook the work of wiring for a system of alarm and signal bells in the upper 'tween deck of No. 4 hold of the Dutch motor vessel, *Tuva*. The work was carried out in the ship while she was lying in wet dock in King George V. Dock, London. It involved fixing tubing along the underside of the main deck. The hold in which the men were working was immediately underneath the main deck of the ship, and there were hatchways in the main deck and also in the deck on which the work was being carried out. Between the aft end of the hold and the hatchway in the 'tween deck there was a space which was almost blocked by a fender, a very narrow space of about eight inches being left between the fender and the hatchway. On the port side of the hatchway there was a large propeller lying on the 'tween deck which came up to within three or four feet of the hatchway. A little forward of the propeller there were two piles of hatchway covers lying side by side and coming right up to the hatchway. It was not disputed but that the situation round the hatchway, so long as it was open, was one of considerable danger for men working in the neighbourhood. On August 6, when the work began, the defendants' charge hand, a man named Thompson, saw that all the hatch covers were off the hatchway in the 'tween deck where the men were going to work, and also that there was no lifeline round the open hatchway to afford any protection. At that time the hatch covers of the hatchway in the main deck above were all off so that a considerable amount of light was coming down through the open hatchway above. Thompson considered that with all the lumber and traps about the place, it would be very dangerous for his men to work there with the hatch covers off the hatchway in the 'tween deck, and he, therefore, asked the chief

officer to put all the covers on that hatchway. The chief officer had the covers put on only two out of the eight compartments of the hatchway. Thompson, although he considered that the place was not safe for the men to work in unless the whole of the hatchway was covered, made no further request that the covers should be put on the whole of the hatchway, and he made no attempt by himself or with his men to place the covers on the hatchway, nor did he even rig up a lifeline round the open hatchway. There was no work going on at the time which rendered it necessary that the hatch covers should be off. August 8 was a very wet day and the ship's officers, to prevent the rain coming through the open hatchway and soaking the hold, had the covers put on the hatchway in the main deck. The result was to shut out all daylight from the hold in which the men were working. The only artificial light which they were using was a movable cluster of lights which was resting on the deck on which they were working propped up on the floor, throwing the light to the underside of the main deck where they were fixing the tubes. This cluster of lights did not light up the hold at all. When the dinner hour came on August 8 all the workmen, including the plaintiff's husband, left the hold and came up on deck. On returning to work after dinner the plaintiff's husband tripped over the pile of hatch covers and fell through the open hatchway on the 'tween deck to the bottom of the ship and died shortly afterwards.

The plaintiff claimed that there had been a breach by the defendants of various statutory regulations imposed on employers for the protection of their workmen and, alternatively, that the defendants were liable at common law for the death of her husband. The regulations relied on by the plaintiff were the Shipbuilding Regulations, 1931 (St. R. & O. 1931, No. 133), made by the Secretary of State under s. 79 of the Factory and Workshops Act, 1901, in respect of the construction and repair of ships in shipbuilding yards (1).

(1) These regulations provide that "it shall be the duty of the "occupier to comply with parts I. "to VIII. of these regulations. "Provided that when a ship is "being repaired in public dry dock, "the person who contracts with "the owner of the ship or with his "agent to execute the work of

"repair, shall be deemed to be the "occupier for the purposes of "parts I. to VIII. and it shall be "his duty to comply with the said "parts."

By reg. 1: "Safe means of "access shall be provided to all "parts of the ship to which persons "employed may be required to

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Sellers K.C. and *J. R. Ogilvie Jones* for the plaintiff. The defendants are liable in damages to the plaintiff for breaches of statutory duty. The obligations imposed by regs. 1, 10 and 42 of the Shipbuilding Regulations, 1931, although formerly binding only the occupier of a shipbuilding yard or, where a ship is being repaired in a public dry dock, the persons undertaking the work of repair, are now extended in their application by ss. 60, 106 and 159 of the Factories Act, 1937, so that they bind a contractor where a ship is being repaired in a harbour or wet dock. These regulations, which could have been made under s. 60 of the Act of 1937 (1) and were in force at the "proceed in the course of their employment."

Reg. 10: "All openings in decks and tank tops shall be securely protected. Such protection shall be maintained in position and when necessarily removed in the course of work shall be replaced as soon as practicable"

Reg. 42: "(a) All parts of a ship where work is being carried on shall be efficiently lighted. (b) All approaches to such parts and to places to which a person employed may be required to proceed in the course of his employment shall be adequately lighted and, in particular, lights shall be provided at all deck and other dangerous openings and at all ladders and gangways."

(1) Factories Act, 1937, s. 60 (which is in part IV. of the Act and is headed: "Special Regulations for Safety and Health"), sub-s. 1: "Where the Secretary of State is satisfied that any manufacture, machinery, plant, process, or description of manual labour, used in factories is of such a nature as to cause risk of bodily injury to persons employed in connexion therewith, or any class of those persons, he may, subject to the provisions of this Act, make such special regulations as appear to him to be reasonably practicable and to meet the

"necessity of the case." Sub-s. 2: "Special regulations so made may, among other things (c) modify or extend with respect to any class or description of factory any provisions of part I., part II. or this part of this Act, being provisions imposing requirements as to health or safety; and may impose duties on owners, employed persons and other persons, as well as on occupiers."

Sect. 106, which is in part VII., sub-s. 1: "Subject as hereinafter in this section provided, the provisions of this Act hereinafter in this section mentioned shall apply to any work carried out in a harbour or wet dock in constructing, reconstructing, repairing, refitting, painting, finishing or breaking up a ship that is to say (b) the provisions of part IV. with respect to special regulations for safety and health and for the purpose of such provisions the ship shall be deemed to be a factory, and any person undertaking such work shall be deemed to be the occupier of a factory."

Sect. 151: ". . . . And (whether or not they are factories by reason of the foregoing definition) the expression 'factory' also includes the following premises in which persons are employed in manual labour, that is to say:

commencement of the Act of 1937, continue in force by virtue of the proviso to s. 159. They could have been made applicable to a factory as defined by s. 106, under which section a ship is to be deemed to be a factory and any person undertaking the work of repair to a ship is to be deemed to be the occupier of a factory, and the regulations are to be deemed to include the work of repair to a ship carried out in wet dock. Some effect must be given to the words in s. 159 "and, in so far as it" "could have been made or given under a particular provision of" "this Act, shall be deemed to have been made or given under" "that provision." They were intended to make the Ship-building Regulations, 1931, binding as they could have been made under s. 60, and to incorporate in them the definition of "occupier of a factory" in s. 106 so as to impose on the person undertaking the work of repair to a ship in wet dock the duties arising under the regulations. The words in s. 159 would not have any effect unless this meaning is given to them. Stable J. adopted this construction of the Act and regulations in *Fitzpatrick v. C. & H. Crichton* (1921), *Ld.* (1), a case which on its facts was very similar to the present, and that decision ought to be followed. Alternatively, the defendants are liable to the plaintiff at common law. A

"(i.) any yard or dry dock (including the precincts thereof) in which ships or vessels are constructed, reconstructed, repaired, refitted, finished or broken up"

Sect. 159, sub-s. 1: "Subject as hereinafter provided the enactments referred to in sch. IV. to this Act are hereby repealed to the extent specified in the third column of that Schedule" [including the whole of the Factory and Workshop Act, 1901]. "Provided that any order, regulation, byelaw, requirement, appointment, or agreement made or certificate (other than a certificate given under s. 14 of the Factory and Workshop Act, 1901) or notice given under any enactment repealed by this Act which is in force at the commencement of this Act shall continue in force and shall have effect as though

"it had been made or given under this Act, and, in so far as it could have been made or given under a particular provision of this Act, shall be deemed to have been made or given under that provision, and any such order or regulation made by the Secretary of State under a power which is exerciseable under a corresponding provision of this Act by a different class of instrument, shall be deemed to be an instrument of that class, so, however, that any order or regulation of the Secretary of State which continues in force by virtue of this proviso may, in so far as may be necessary to bring it into conformity with this Act, be varied or revoked by an order made by him under this Act."

(1) Unrep. Nov. 14, 1921.

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master who employs a servant on work of a dangerous character is at common law bound to take all reasonable precautions for the workman's safety, and if, by reason of a breach of that duty, a servant suffers injury, the employer is prima facie liable: *Smith v. Baker & Sons* (1); *Williams v. Birmingham Battery and Metal Co.* (2). There is also an obligation on employers to provide a safe system of work: *Wilsons & Clyde Coal Co. v. English* (3). In the present case the work was of a dangerous character and was being carried out under conditions of extreme danger. The defendants' charge hand realized the danger, yet he allowed the work to go on without insisting on the hatchway being covered or putting a lifeline round the open hatchway, and when the hatchway in the main deck was covered so that the deck below was in complete darkness he did not see that sufficient artificial light was provided. Therefore, the system of work under which the plaintiff's husband had to work was unsafe, and the defendants are liable for the charge hand's negligence: see *Speed v. Thomas Swift & Co.* (4).

H. I. Nelson for the defendants. The plaintiff is not entitled to recover damages from the defendants for not complying with the requirements of the Shipbuilding Regulations, 1931, as those regulations only impose obligations on the occupier of a shipbuilding yard, and the person who contracts to do repairs to a ship in a public dry dock. According to the decision of the House of Lords in *Smith v. Cammell, Laird & Co.* (5) the duty of complying with the regulations is cast on the occupier of the shipbuilding yard and not on the employers of labour engaged on the work of repair to the ship. Lord Wright said (6) that it was impossible to bring s. 104 of the Factory and Workshop Act, 1901, into the Shipbuilding Regulations so as to affect their operation. In the same way s. 106 of the Act of 1937 cannot be brought into the Shipbuilding Regulations so as to extend their operation. It is true that the Shipbuilding Regulations could have been made under s. 60 of the Act of 1937, but the power of the Secretary of State to make regulations under s. 106 is limited to regulations as regards ships in harbours or wet docks and no such regulations have been made. The words "in so far as it could have been made or" given under a particular provision of this Act, shall be deemed

(1) [1891] A. C. 325, 353.

(4) Ante p. 557.

(2) [1899] 2 Q. B. 338, 345.

(5) [1940] A. C. 242.

(3) [1938] A. C. 57.

(6) Ibid. 270.

"to have been made or given under that provision" in the proviso to s. 159 of the Act of 1937 cannot be construed as extending the application of the Shipbuilding Regulations to the repair of a ship in a wet dock. The decision of Stable J. in *Fitzpatrick v. C. & N. Crichton* (1921), *Ld.* (1) was wrong and ought not to be followed. The only obligation imposed at common law on the defendants is to have their own premises safe and to have safe systems of work on their own premises. If work is being done on premises which do not belong to the employer and over which he has no control, he is under no obligation as regards the safety of the premises: *Taylor v. Sims & Sims* (2). In the present case the defendants had no control over the ship and no negligence or failure of statutory duty has been proved against them. To leave the hatchways uncovered was a breach of statutory duty for which the ship-owners are liable, but the plaintiff has elected not to sue them.

Sellers K.C. replied.

Cur. adv. vult.

July 23. ATKINSON J. stated the facts, and continued: It is plain that every one of the three regulations relied on by the plaintiff was broken, but the question is whether those regulations impose any duty on the defendants. It was held by the House of Lords in *Smith v. Cammell, Laird & Co.* (3) that the regulations bound only the occupier of a shipbuilding yard, and, therefore, did not bind the employer of labour working on a ship. After providing that "it shall be the duty of the occupier to comply with parts I. to VIII. of these regulations," there is a proviso: "Provided that when a ship is being repaired in public dry dock, the person who contracts with the owner of the ship or with his agent to execute the work of repair, shall be deemed to be the occupier for the purposes of parts I. to VIII. and it shall be his duty to comply with the said parts" with certain exceptions. The final result of the regulations is that the occupier of a shipbuilding yard is liable for a breach of the regulations, but, if a ship is being repaired in a public dry dock, the person undertaking the work of repair of the ship is also bound by the regulations. If the work in the present case had been done in a public dry dock, clearly the defendants would be bound by the regulations, but it was not done in such a

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(1) Unrep.

(3) [1940] A. C. 242.

(2) (1942) 58 T. L. R. 339, 341.

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dock. That, however, does not conclude the question. In 1937 a new Factories Act was passed. It repealed the Factory and Workshop Act, 1901, and unless something was done by the new Act to keep in force regulations made under the Act of 1901, they, too, would have disappeared along with the Act of 1901 by virtue of which they had been made. It is said that the result of ss. 60, 106 and 159 of the Act of 1937 is not merely to maintain these regulations in full force and effect, but to give them a much wider interpretation. The argument is that these regulations could have been made under s. 60, and, therefore, they continue in force; that they could have been made applicable to a factory as defined by s. 106, and, therefore, they are to be deemed to be applicable to such a factory; and as, by s. 106, a "ship shall be deemed to be a factory, and "any person undertaking such work shall be deemed to be the "occupier of a factory," therefore, they must be deemed to include what grammatically they do not include, namely, a "factory" of this kind. In support of this contention the plaintiff relied on a decision of Stable J. in *Fitzpatrick v. C. & H. Crichton* (1921), *Ld.* (1)—a case very similar in its facts to the case with which I have to deal—where that learned judge accepted the view now put forward on behalf of the plaintiff. According to a transcript of the shorthand note of the judgment, he said: "The Factories "Act of 1901 is repealed by the Act of 1937. The Factories "Act of 1901 gave the Secretary of State or the appropriate "authority power to make certain regulations and when "that Act was repealed the effect of that repeal might "be to repeal the regulations which had been made under "the Act. This danger, however, in my judgment, is met "by s. 159 of the Act of 1937. That section first of all "provides that the enactments set out in the fourth schedule "are repealed, and included in the repeal is the whole of the "Factory and Workshop Act of 1901. Then it goes on to "say: 'Provided that any order, regulation, . . . given "under any enactment repealed by this Act which is in force "at the commencement of this Act shall continue in force.' "These regulations were made under the Factory and Work- "shop Act, 1901. They were, therefore, made under an "Act which was repealed by the 1937 Act, but which were in "force at the time the 1937 Act became law. The section "provides, therefore, that the regulations shall continue in

(1) Unrep. Nov. 14, 1941.

"force, but the section does not stop there. It goes on to provide, 'and shall have effect as though it had been made or given under this Act, and in so far as it could have been made or given under a particular provision of this Act, shall be deemed to have been made or given under that provision.' So anxious is the legislature to see that nothing is destroyed, that there is a provision (which I need not bother to read) to the effect that where a particular order or regulation, or whatever it is, is made by an instrument in a particular form, and the new Act gives the appropriate authority to make a similar regulation by a different sort of instrument, the instrument under which the regulation was in fact made shall be deemed to be the same sort of instrument as it would have been made by if it had been made (as it was not) under the new Act. It seems to me to be an excess of subtlety (a degree of subtlety which I am quite incapable of comprehending) to contend that I to-day have not got to look at these regulations as being regulations in full force and effect, and regulations which were made under the combined power of s. 60 and s. 106 of the Factories Act, 1937. That being so, what is the position? Sect. 106 says that 'for the purpose of such provisions the ship shall be deemed to be a factory, and any person undertaking such work shall be deemed to be the occupier of a factory,' and when one looks at regs. 10 and 42 it seems to me that, whether it is fair or unfair, whether it is wise or whether it is foolish, the legislature has imposed on the defendants the obligation to light that part of the ship properly in which they were working, and the further obligation to see that the hatches, at all events in that part of the ship which was in the vicinity of the work, were properly covered up. That statutory duty was clearly neglected, and the combination of the hole in the hatch and the absence of light constituted a trap which in this case was literally a death trap."

I am asked to follow that decision of my brother Stable. Regretfully I cannot bring myself to take the same view. It seems to me that all that the final words in s. 106 do is to provide that "for the purpose of such provisions," that is, the provisions of s. 60—"the ship shall be deemed to be a factory." The section does not say: "for the purpose of existing regulations the ship shall be deemed to be a factory," but "for the purpose of such provisions," that is, that the Secretary of State, under s. 60, shall have power to make regulations

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which shall refer to a ship in a wet dock, and to impose on persons undertaking work on it any duties which he thinks fit. I cannot see how the mere fact that the Secretary of State can make regulations which shall apply to the repair of a ship in a wet dock can alter the meaning of the regulations which impose duties on occupiers of shipbuilding yards and on no one else except persons undertaking work in a public dry dock. I am asked to say that these regulations are to be deemed to be recast, but in what way and in what form is the recasting to take effect? I cannot think there is anything in this Act of Parliament which is intended to change the wording of the Shipbuilding Regulations, 1931. They are to be deemed to be kept alive. If they had been made under one form of order, and the Act of 1937 required a different form of order for such a purpose, the regulations would be deemed to have been made under the different form of order. It would seem that the final words of s. 159 strongly support the view which I take: "that any order or regulation of the Secretary of State which continues in force by virtue of this proviso "may, in so far as may be necessary to bring it into conformity "with this Act, be varied or revoked by an order made by him "under this Act." That means that, if the Secretary of State thinks it right to vary the existing regulations and make them apply to a ship being repaired in a wet dock, he has power so to do. I have come to this decision with considerable regret, because I am differing from a brother judge, but I cannot bring myself to see how anything in this Act can be relied on as recasting the existing regulations. It appears to me that they remain as they were, and that their interpretation must remain as it was, binding, so far as affects the present case, merely the occupier of a shipbuilding yard or a person contracting with the owner of a ship to carry out repairs in a public dry dock. Therefore, I think that the plaintiff's case, in so far as it is based on these regulations, must fail.

I have now to consider the alternative way in which the plaintiff's case is framed. There is now no doubt that there are at least two overriding duties which are imposed on employers. The first I will take from *Smith v. Baker & Son* (1) where Lord Watson said (2): "It does not appear to me to "admit of dispute that, at common law, a master who "employs a servant in work of a dangerous character is bound "to take all reasonable precautions for the workman's safety.

(1) [1891] A. C. 325.

(2) Ibid. 353.

"The rule has been so often laid down in this House by Lord Cranworth, and other noble and learned lords, that it is needless to quote authorities in support of it." In *Williams v. Birmingham Battery and Metal Co.* (1) the principle is enunciated equally clearly in the judgment of Romer L.J. where he said (2): The cases "appear to me to establish the following propositions as to the liability at common law of an employer of labour. If the employment is of a dangerous nature, a duty lies on the employer to use all reasonable precautions for the protection of the servant. If by reason of breach of that duty a servant suffers injury, the employer is prima facie liable; and it is no sufficient answer to the prima facie liability for the employer to show merely that the servant was aware of the risk and of the non-existence of the precautions which should have been taken by the employer, and which, if taken, would or might have prevented the injury." That duty, therefore, is clear. It may be the same duty expressed in another way, but it is equally clearly established that employers are bound to provide a safe system of work. In *Wilsons & Clyde Coal Co. v. English* (3) the House of Lords reaffirmed that there was an obligation on owners of a mine to provide a safe system of work. As to these overriding duties it was made abundantly plain in that case that the obligation is one which cannot be delegated, or, at least, that, if it be delegated to a manager or other servant, the employers remain liable for any breach of duty of their servant and that they cannot rely on the doctrine of common employment.

It has been argued on behalf of the plaintiff in the present case that there was work of a dangerous character being carried out under conditions of extreme danger, and that the system of work adopted by Thompson, the defendants' charge hand, was dangerous. It was urged on behalf of the plaintiff that no steps were taken to minimize the obvious danger and that the system of work was one which was not safe. The answer of Mr. Nelson on behalf of the defendants was that the only obligation imposed by the regulations on the defendants was an obligation to have their own premises safe and to have systems of work on their own premises that were safe and proper, but that, if work was being done on premises not belonging to the employer, he was under no obligation as to the

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(1) [1899] 2 Q. B. 338.

(3) [1938] A. C. 57.

(2) Ibid. 345.

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safety of those premises. In support of this proposition, Mr. Nelson relied on a decision of Lewis J. in *Taylor v. Sims & Sims* (1). It is necessary to draw a clear distinction between what is meant by being responsible for the safety of the premises on which a man is working, and the necessity for having a proper system of work. If the danger is part and parcel of the premises where a man is engaged to work, for instance, if this man had met his death through the deck on which he was working giving way and collapsing, it may very well be that the employers can say: "We are under no obligation as to "the safe construction of the premises to which we have to "send you to work." That, however, is something quite distinct from the system of work which they adopt when they are working on premises belonging to other people. The distinction, I think, is made clear in a case, which, in my view, governs this action entirely, namely, *Speed v. Thomas Swift & Co., Ltd.* (2). There the employers, who were stevedores, engaged the injured man to assist in the unloading of cargo from a ship, so the work was not being done on premises occupied by or belonging to the employers. The starboard rail was broken and it was not protected or removed during the operations. Moreover, the danger was increased by the presence of dunnage lying on the deck. Owing to a hook catching the rail, either the rail or part of the cargo fell on the workman who was in a barge alongside the ship. The employers contended that they had provided a safe system of working, that the accident was due to the failure of a fellow servant of the workman to carry out the system properly, and that, therefore, they were exonerated from liability by the doctrine of common employment. The Court of Appeal, however, held that the employers had failed to provide a safe system of working, and that the accident was due to that failure and not to the failure of a servant to carry out a proper system. Lord Greene M.R. said (3): "The real question "is whether or not, in the particular circumstances of this case, "failure to remove or protect the rail constituted the system "of working an unsafe one In my opinion, the latter "view is the correct one. What exactly is meant by 'a safe "'system of working' has never, so far as I know, been precisely "defined. The provision of such a system falls within the "master's province of duty. If he delegates it, he remains

(1) 58 T. L. R. 339.

(3) Ibid. 562.

(2) Ante p. 557.

"responsible for any inadequacy in the system just as much
 "as if he had personally provided it, and he cannot excuse
 "himself by saying that he had good grounds for relying on
 "the competence of the person to whom he delegated the duty."
 His lordship then quotes from the judgment of the Lord
 Justice Clerk in the Court of Session in *Wilsons & Clyde
 Coal Co. v. English* (1) and later he says this (2): "But in
 "many kinds of work there is no such regularity or uniformity,
 "and what is a safe system can only be determined in the light
 "of the actual situation on the spot at the relevant time. A
 "system of working may consist of a number of elements
 "and what exactly it must include will, it seems to me, depend
 "entirely on the facts of the particular case. For example,
 "one element may be the sequence in which a particular
 "job ought to be carried out, e.g., in a combined job of
 "demolition and excavation it may be dangerous to begin
 "to excavate before a neighbouring structure is demolished.
 "The decision as to which task is to be performed first appears
 "to me to lie within the master's province and to be a matter
 "of system. It is part of the lay-out of the job which it is
 "the master's duty to decide, and, in doing so, he must pay
 "proper regard to the conditions affecting the safety of his
 "men. The lay-out of the job is logically prior in time to the
 "commencement of the work although, of course, it may have
 "to be modified as the work proceeds, e.g., if in the course
 "of the work a neighbouring bank threatens to collapse on
 "the workmen, the taking of proper steps to shore it up is, it
 "appears to me, a matter of system. It is logically prior in
 "time to the continuance of the work and is concerned not
 "with the work itself, but with the safety of the conditions
 "in which it is performed. I do not venture to suggest a
 "definition of what is meant by system, but it includes, in
 "my opinion, or may include according to circumstances, such
 "matters as the physical lay-out of the job—the setting of the
 "stage, so to speak—the sequence in which the work is to be
 "carried out, the provision in proper cases of warnings and
 "notices and the issue of special instructions." A little later
 the Master of the Rolls says (3): "If the master is unable to
 "give such close attention to every job which he undertakes
 "as will enable him to provide a safe system for all of them and
 "is thus compelled to leave its provision to others, he cannot

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(1) 1936 S. C. 883, 904.

(3) Ibid. 564.

(2) Ante p. 563.

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"escape responsibility. The way to test the correctness of my view is to consider the case where the master is present himself. In such a case, if he lays out the job in a way which is not reasonably safe and sets his men to work in dangerous conditions which could be eliminated by the exercise of due skill and care, it appears to me impossible for him to say that he has not failed in a duty which lies on him and on no one else." The Master of the Rolls goes on to hold that a reasonable master would have said that the presence of an unprotected rail was unsafe as a hook might foul it, and that, therefore, the rail must be removed, and he treated that as part of the system under which the men were working. MacKinnon L.J. came to the same conclusion, although with some doubt whether the accident might not have occurred in the carrying out of a proper system. Goddard L.J. was just as strong in the view he expressed as was the Master of the Rolls. He said (1): "If the master were himself in charge of the operation and saw that the rail was properly protected, he would be fulfilling his duty of providing a proper system. If, when his back was turned or he had gone to another job, one of the men removed the protection and an accident happened, I cannot see that it could be said that the master had failed in his duty." Later he said (2): "Precautions which are necessary for the safety of workmen seem to me to be necessary parts of any system, for, if they are neglected, the system is at once unsafe."

With that decision before me it seems to me impossible to say that in this case a proper system of work was provided by Thompson, the defendants' charge hand. There were conditions of danger which could, and ought to have been, provided against. Thompson realized the danger of the open hatchway, but he was content when merely one end of it was covered instead of seeing that it was all covered or that a lifeline was put round it. At any rate, on the third day when the hatch covers were put over the hatchway overhead in the main deck, depriving the hold of all daylight, there was then the obvious duty to see that artificial light was provided. To let the work go on in conditions of almost complete darkness close to this great unfenced hole seems to me to have been allowing the work to proceed under a system which was dangerous in the extreme, and I think that that was negligence on the part of Thompson for which his employers are clearly liable.

(1) Ante p. 571.

(2) Ibid. 572.

I must now refer to the decision of Lewis J. in *Taylor v. Sims & Sims* (1) which was relied on by Mr. Nelson. The headnote is as follows : "While an employer is under a common law duty to his employees to take reasonable steps to ensure that the place where they work for him is safe, and while he is under a similar duty to provide them with a safe system of working and proper plant or equipment wherever he instructs them to work, there is no such duty on him to ensure the reasonable safety of premises neither belonging to nor occupied by him and over which therefore he has no control." The argument was that there was no duty to provide for the reasonable safety of the premises because they were not occupied by the employers and were premises over which they had no control. The facts in that case were completely different from those in the present case. A firm of contractors were employed to effect certain first aid repairs in a row of houses which had been damaged by enemy action. The contractors' foreman and manager inspected the premises before the work began. The London County Council had placed notices on certain of these houses stating that they were dangerous, but not on those on which the repair work was to be carried out. While a carpenter employed by the contractors was doing repair work on the premises, a floor collapsed beneath him and he was injured. It was sought on behalf of the injured man to say that these were premises where the contractors were ordering their employee to work and that, therefore, there was an obligation on them to make sure that the premises were safe. That, of course, is a totally different class of case from the present. The contractors had no control over the part of the floor where the man was working. They had no knowledge of the want of safety of the floor, they were not in occupation, and they had no control over the premises. Lewis J., in the course of his judgment, said (2) : "There is, however, very great difficulty, in my opinion, in saying that there is a duty on an employer to see that premises on which he asks his workmen to work are reasonably safe when he has no control over those premises whatever." There the learned judge is dealing with the question of the safety of the premises themselves. There was nothing wrong with this ship. In the case of a ship, however, there are certain necessary parts of the ship, such as the holds, which are in darkness when the hatchway

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(1) 58 T. L. R. 339.

(2) Ibid. 341.

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covers are on, and where, therefore, there are dangers which can be guarded against. To make provision against obvious dangers of that sort is part and parcel of the system of working, and is quite different from the duty which Lewis J. was considering, the duty of having safe the premises on which the men were to work. I think, therefore, that that case, interesting though it is as showing where the line is to be drawn, has no bearing on the case which I have to decide. I think that the plaintiff here is entitled to recover damages from the defendants, and I give judgment in her favour for 500*l.* with costs.

Judgment for plaintiff.

Solicitors for plaintiff: *Rowley, Ashworth & Co.*

Solicitors for defendants: *Carpenters.*

R. F. S.

C. A. LYON AND ANOTHER v. THE DAILY TELEGRAPH,
 LIMITED.

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 July 21, 29.

*Defamation—Libel—Fair comment—Letter published in newspaper—
 Fictitious name and address of writer.*

A newspaper published in its correspondence columns a letter, which purported to give the name and address of the writer, commenting unfavourably on a broadcast entertainment conducted by the plaintiffs. The comment in its terms did not exceed the limits of fair and honest criticism but the letter contained matter found to be defamatory of the plaintiffs. No steps were taken by the newspaper to verify the name and address of the writer, and after the publication of the letter it was discovered that he had given a fictitious address and probably also a fictitious name. In an action of defamation brought by the plaintiffs against the proprietors, printers and publishers of the newspaper, the defendants pleaded fair comment:—

Held, that it was not necessary for the defendants in order to sustain the defence of fair comment to prove affirmatively that the writer of the letter honestly held the opinion expressed in it, that there is no duty on a newspaper to verify the name and address of a correspondent and therefore the fact that the writer had given a fictitious name and address was irrelevant and in no way prevented the defendants from relying on the defence of fair comment, which in the circumstances succeeded.

Quære, whether even if it had been proved that the writer of the letter did not honestly entertain the opinion expressed in it, the defendants would have been precluded from relying on the defence of fair comment.

APPEAL from Hilbery J.

On March 5, 1942, the Daily Telegraph, which was then publishing, under the generic title of "Flabby Amusement," correspondence, critical or otherwise, relating to the entertainments which were being broadcast by the British Broadcasting Corporation, published a letter, which it had received from a person who signed himself "A. Winslow," and gave his address as "The Vicarage, Wallington Road, Winchester." This letter, referring to the radio entertainment "Hi Gang," which was broadcast every Sunday evening for several weeks, was in the following terms: "Sir, every Sunday evening at church 'time there is put on the air a costly broadcast which is an 'insult to British intelligence. The type of humour consists 'of a vulgar exchange of abuse. One comedian alludes to 'the other as 'that louse' and his chief humorous contribution 'is to say at intervals 'I'm laughing me blooming 'ead off.' 'The woman artist has a fair voice and sometimes sings a good 'song, but for the most part she indulges in vulgar wisecracks. 'We must be a nation of lunatics to permit such a waste of 'money for such a very sordid show.'" The plaintiffs, as two of the principal artists in the entertainment and largely responsible for its presentation and subject-matter, sued the proprietors, printers and publishers of the newspaper for damages for libel. They alleged in their statement of claim that the words in the letter meant, and were understood to mean, that the entertainment was of so offensive and degrading a character that a clergyman had felt constrained to pillory those responsible for its presentation and production and the artists taking part in it in one of the leading newspapers, and that the plaintiffs had, in consequence, been seriously injured in their character, credit, and reputation, and in the way of their profession, and had been brought into public scandal, odium and contempt. The defendants pleaded (*inter alia*) that the words complained of were fair comment and criticism, made in good faith and without malice towards the plaintiffs on a matter of public interest. After the publication of the letter it was ascertained that its writer had given a fictitious address, there being no Wallington Road in Winchester, and that no such name as "A. Winslow" appeared in Crockford's Clerical Directory. Hilbery J. held, not without considerable doubt, that the letter was defamatory of the plaintiffs as artists. As to the defence, the letter was certainly comment expressing an opinion which could be

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honestly held and comment on a matter of public interest, but there was one statement of fact relied on which was not accurate, namely, that the entertainment was a "costly broadcast." Moreover, there was no evidence by the defendants that the opinion expressed in the letter was honestly held by its writer. On the other hand, the fact that the writer hid himself behind the cowardly device of a false name and address was some evidence that he was not wholly prompted by conscience. He, therefore, held that the defence of fair comment failed, and he awarded the plaintiffs 50s. each. The defendants appealed.

Serjeant Sullivan K.C. and *Valentine Holmes* for defendants. The finding of the learned judge cripples the whole defence of fair comment which has stood for so long. The fact that the name and address of the writer are fictitious, considered as evidence of malice, is irrelevant when only the newspaper, which takes responsibility for its own publication, is sued: see *Hennessy v. Wright (No. 2)* (1). Even if the statement of fact in the letter, that the broadcast was "costly," is inaccurate, it is not defamatory and is not a fact on which the alleged libellous comment was based. It is, therefore, not a ground on which the defendant can be denied his defence of fair comment. It is a well-established rule that a newspaper is under no obligation to disclose the names of its correspondents. [They were stopped.]

Slade K.C. for the plaintiffs. It is not suggested that, apart from the facts of this case, the words of the letter could not be fair comment, or that a man could not honestly take the view of this broadcast which the letter suggests. If it had been signed with a nom de plume such as "Pro bono publico" or "K. C.," the plaintiffs would have had no case. If it had been written by a person who was genuinely a clergyman it could not be contended that it was not fair comment, but, the signature being fictitious and the address false, what otherwise would be justifiable becomes unfair comment. The opinion expressed in the comment must be the opinion honestly held by the writer, whether he be a party to the action or not. To say that because the writer is not and cannot be sued it is immaterial whether or not the words express his honest opinion, is fantastic. The onus is on the plaintiffs to prove that the words complained of do not express

the honest opinion of the writer, and they have discharged that onus by proving that no such person as "A. Winslow" exists, and that, therefore, there is no such person to express an honest opinion. It may be assumed that the writer was actuated by some indirect motive, and the onus is then on the defendants to prove that he honestly held the opinion expressed in the letter. They have not done so. The newspaper represented that there was such a person as the signature represented, who held the opinion expressed in the letter. That was not true and, therefore, the comment which the newspaper published is not fair comment in law. Two parties defamed the plaintiffs—the newspaper and the writer of the letter. They are co-tortfeasors, and if the writer is actuated by malice the plea of fair comment is lost to the newspaper, whether or not he is joined as a co-defendant. A comment cannot be fair which is based on facts that are not truly stated, and one of the statements of fact implicit in this libel is that it is the honest opinion of "A Winslow, The "Vicarage, Wallington Road, Winchester." Alternatively, it is submitted that the newspaper was under a duty to verify the signature of the writer, and having failed to do so is guilty of negligence and loses its right to the plea of fair comment. [He referred to *Thomas v. Bradbury, Agnew & Co., Ltd.* (1); *Falcke v. Herald & Weekly Times, Ltd.* (2); *McQuire v. Western Morning News* (3); *Crozier v. Wishart Books, Ltd.* (4); *Lyle-Samuel v. Odhams, Ltd.* (5); and *Hunt v. Star Newspaper Co.* (6).]

Serjeant Sullivan in reply. If a malicious libel is published by a newspaper at the request of the writer and the writer is sued, it is a malicious publication on the writer's behalf, but the court cannot try the issue of malice in another person who is not alleged to be the servant, agent or co-conspirator of the defendant, and who, not being sued, is not before the court. The author of a letter which is published in a newspaper is not a joint-tortfeasor with the newspaper. The newspaper is only responsible for its own publication, and, if it alone is sued, the case can only be proved by evidence against it, unless it had reason to know the malicious intention of the author.

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(1) [1906] 2 K. B. 627, 638.

(2) [1925] V. L. R. 56.

(3) [1903] 2 K. B. 100.

(4) [1936] 1 K. B. 471.

(5) [1920] 1 K. B. 135, 143.

(6) [1908] 2 K. B. 309, 323, 324.

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SCOTT L.J. [after stating the facts and reading the letter complained of:] Hilbery J. came to the conclusion on the whole, "not without considerable doubt," that the publication was defamatory of the plaintiffs as artists, that is to say, not of them as man and woman in their private lives, but as "Ben Lyon" and "Bebe Daniels" in the "Hi Gang!" entertainment. He was further of opinion that the opinions expressed in the letter were such as an honest person might hold, and that, so far as the criticism itself was concerned, it was fair comment on a matter of public interest. On the other hand, there was one statement of fact in the letter, the phrase "costly broadcast," which he thought was inaccurate and gave "a barb" to the criticism that followed, and I gather he was of opinion that that inaccuracy of statement by itself put an end to the plea of fair comment. I do not agree with the learned judge on that point, for there is nothing defamatory of the plaintiff in saying the broadcast was costly; nor was there any evidence about cost, but there is another fact in the case which requires careful consideration, and, indeed, raises a new point in the law about fair comment. It appears that there was no person of the name of the signatory who could be traced, and there was no vicarage at the address on the letter. In other words, the letter was, in fact, not a signed letter and not merely anonymous, for the writer had concealed his identity by putting in a false address, even if he was really "A. Winslow." Of these last two points the newspaper was ignorant. On these facts the learned judge expressed the view that, in an action of libel against a newspaper in respect of the contents of a letter from a correspondent, the onus on the issue of fair comment lies on the defendant newspaper to prove affirmatively that the writer of the letter was merely expressing his honest opinion, and on this he found for the plaintiffs, holding, naturally enough, that there was no positive evidence in the case before him about the motive of the person who actually wrote the letter.

Before considering this conclusion, a little further explanation of the facts which led the learned judge to it is necessary. It was admitted or proved below that the letter came to the office of the Daily Telegraph bearing the address on the note-paper which was printed in the newspaper and also the name of the signatory as so printed. The good faith of the

editorial staff in printing it was not impugned. They had assumed the genuineness of both, though, apparently, they had not made inquiries themselves to verify either signature or address. In these circumstances the learned judge held that the defendants had failed to discharge the onus of proving that the writer of the letter (whoever he was) honestly held the views expressed in the letter. He further inferred that "the motive" of the anonymous writer "was not wholly prompted by conscience," and for that reason held that the plea of fair comment "broke down completely" and made it "an undefended action." He gave very small damages because the plaintiffs themselves had said that they did not bring the action for the sake of damages. The learned judge had thus two separate reasons for holding that the defendants' plea of fair comment failed. On the issue of cost I have already said that, in my opinion, the learned judge took an erroneous view. I think he was wrong both in fact and law. The entertainment, as is evident from the transcripts of the programmes, was obviously one which involved an outlay, considerable in itself, and, perhaps, more so relatively to the public interest in the matter broadcast. Anyhow, the comment that the entertainment was costly could not be regarded as defamatory of the actors in it. Even if it could, the criticism of the relative value of the broadcast in comparison with its cost to the nation was obviously mere comment on a matter of public interest and prima facie, as comment, quite fair. The other ground on which the learned judge relied is the only one which caused us to reserve judgment. It raises a matter of general importance. There is no question but that the comment contained in the letter represented the honest opinion of the Daily Telegraph, and at the trial no doubt was cast on the complete belief of the newspaper that they were publishing a letter in which the writer was making a fair comment on a matter of public interest. I cannot accept the submission implied in the argument of Mr. Slade before us, that there is a general rule of law making it the duty of every newspaper to verify the signature and address of the writer of a letter before publishing it, although it may be desirable on public grounds that, so far as is practicable, the newspaper should take such steps. In most cases writers unknown to the newspaper establish their identity by enclosing a visiting card or a private note to the editor, but to hold as a matter of law, that, where that has not been done, the absence of such

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verification of itself destroys the newspaper's plea of fair comment would be to put on newspapers a heavy burden—a burden so deterrent in practice as very much to reduce the valuable contribution to public discussion which results from a free publication of correspondence in the Press. If the comment is in itself fair within the meaning of the law and if the newspaper publishes it solely as matter of public interest, I cannot see that any hardship is caused to the persons criticized if the newspaper is able to succeed on its plea of fair comment, whereas, if the rule laid down by the learned judge were made general, a very heavy burden of contingent liability would be put on the Press—a burden which on balance does seem to me undesirable from the public point of view and contrary to the principle of the existing law about fair comment. The reason why, once a plea of fair comment is established, there is no libel, is that it is in the public interest to have free discussion of matters of public interest. In the case of criticism in matters of art, whether music, painting, literature, or drama, where the private character of a person criticized is not involved, the freer criticism is, the better it will be for the æsthetic welfare of the public.

There is no decided case which covers the precise point. It is unnecessary to consider how far the rule that the fairness of comment may be destroyed by any oblique motive extends where it is the defendant's own motives which are concerned, but, assuming that comment inspired by indirect, improper, or private motives ipso facto ceases to be fair and that the writer of such a letter to a newspaper will, when sued for libel, have put himself outside the pale of the defence of fair comment, it does not necessarily follow, as contended by Mr. Slade, that, if he is made co-defendant with the newspaper, the newspaper also will lose its defence of fair comment. Mr. Slade says they are just two joint tortfeasors and they must stand or fall together, but, even if he be right on that contention, it does not necessarily follow that the newspaper will lose its own defence if the writer is not made defendant. In the present case the writer of the letter was never discovered, and, therefore, was not sued. It seems to me contrary to common sense to say that the anonymous writer (who *may* have been absolutely single-minded in his comment) must in law be regarded for the purpose of that contention as if he had been co-defendant and his oblique motive had been exposed in the trial, with the consequence that the newspaper must lose

the protection of the defence. Although there is no direct authority, I think that the question of law is really implicit in the well-established rule that the publishers of a newspaper, when defendants in an action for libel, cannot, on the issue of fair comment, be required to disclose the source of their information. If the innocent state of mind of the writer of a letter published in the newspaper was a relevant fact which had to be proved by him before his plea of fair comment could be established, it would go far towards justifying Mr. Slade's argument, but the very existence of the exceptional rule about interrogatories and discovery in the case of newspaper defendants seems to me to pre-suppose a rule of law that, at least in the absence of special circumstances (on the possibility of which I express no opinion), there is no such presumption or onus, and that fairness of the comment contained in the newspaper's correspondence columns must be judged by its tenor, subject only to the proviso that the statements of fact on which the comment is based are not untrue.

Mr. Slade put forward an alternative contention, namely, that, even if the defendant newspaper's right to rely on its plea of fair comment is not taken from it by the failure of the anonymous writer to come forward and plead his bona fides, yet the newspaper has lost its own right to that defence because it was guilty of negligence or carelessness in publishing the letter without inquiring into the identity of the writer. The answer to this is that fairness and carefulness are different moral and legal qualities, and that while malice or indirect motive may destroy the fairness of an apparently fair comment, negligence does not. I hold, accordingly, that the letter itself in no way exceeded the bounds of fair comment on a matter which was obviously one of public interest, and that on the facts in evidence there was nothing to destroy the defendant newspaper's plea of fair comment.

Before parting with the case, I wish to make one observation. The meaning of the plea of fair comment is well known to lawyers and to most newspaper and other publishers, but some people misunderstand the right of "fair comment." It is one of the fundamental rights of free speech and writing which are so dear to the British nation, and it is of vital importance to the rule of law on which we depend for our personal freedom that the courts should preserve the right of "fair comment" undiminished and unimpaired. Some people evidently think

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C. A. that in a case of libel or slander a judicial pronouncement
 1943 that what the defendant wrote or said was within his right
 — LYON of fair comment means that the court accepts and endorses
 v. his opinions. That impression is, of course, wrong. The
 THE court may, as private individuals, agree or disagree with the
 DAILY opinions expressed. Indeed, it may disagree very much,
 TELEGRAPH, and yet hold that there is nothing in the language used which
 LD. exceeds the limits of public criticism so as to become mere
 Scott L.J. personal defamation. The appeal is allowed, the judgment
 below set aside and judgment entered for the defendants,
 with costs here and below.

MACKINNON L.J. I agree that this appeal should succeed and judgment be entered for the defendants, with costs here and below. A clearer case of fair comment there can never have been, and I think the point made as to the non-existence of the supposed writer or the genuineness of his address was quite irrelevant. The action was against the defendant company, alleging that they had published a libel on the plaintiffs, and the defendants are entitled to say that what they published was not libellous since it was fair comment on a matter of public interest. Having been supplied with a copy of the script of the plaintiffs' performance which was subjected to the defendants' criticism, I am apprehensive that my own comment on it might exceed the bounds of judicial decorum. I, therefore, content myself by repeating the words with which Collins M.R. concluded his judgment in *McQuire v. Western Morning News, Ltd.* (1): "We have had excerpts from the play . . . read to us; and I think it right to say that in my opinion it would be matter of regret for all well-wishers of the stage if an honest critic were debarred from commenting in the sense of this criticism upon such a production."

GODDARD L.J. The words complained of in this case are contained in a letter addressed to and published by the defendants in their newspaper and were a comment on a broadcast entertainment of the plaintiffs. It is not contended that the comment in its terms exceeds the limits of fair and honest criticism. It is, however, submitted, and the learned judge has held, that, as the writer of the letter gave a false name and address, the defendants are deprived of the defence

of fair comment. The address given is undoubtedly fictitious. Whether the name given by the writer is that by which he or she is commonly known there is no evidence at all. The plaintiffs seem to assume that because the address given in a letter is "The Vicarage" the writer must be the vicar of the parish. The letter might equally be that of the vicar's wife, daughter, son, or servant, or visitor. Let it, however, be assumed that "A. Winslow" is not the writer's proper name. In my opinion, that fact is quite immaterial. Anonymity is no evidence of malice. Dramatic and musical criticism in newspapers is usually contained in an unsigned article. Many people whose letters are published in the Press use some form of nom de plume, and had the letter been signed "Disgusted" or "Mother of Six," or with some equally foolish expression, Mr. Slade agrees that that would be no evidence of malice. Evidence may, no doubt, be given to show that a critic was actuated by malice, and then the court or a jury may find that his unfavourable criticism was inspired, not by an honest belief, but by a desire to gratify his malice, but they are not bound so to find. Here there was no evidence of malice and the criticism itself contains none, and so it is unnecessary to consider whether the newspaper would have been able to rely on the defence of fair comment if it had been found that the writer of the letter which they published was not honest, but was inspired by malice in writing what he did. As to the finding that there were misstatements of fact, I cannot follow the learned judge's view. The letter did refer to a costly entertainment. That is a matter of opinion and is not defamatory, and the criticism is not based on the cost but on the nature of the entertainment. To say that the chief humorous contribution was so and so, and that part of one of the plaintiffs' lines consisted of vulgar wisecracks, is obvious comment. I agree that the appeal should be allowed.

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Appeal allowed.

Solicitors for defendants: *Alfred Cox & Son.*

Solicitors for plaintiffs: *Harold Kenwright & Cox.*

A. W. G.

C. A.

TITHE REDEMPTION COMMISSION v. WYNNE.

1943

July 26. *Tithe—Redemption annuity—Land out of which tithe rentcharge issued—Decision by Tithe Redemption Commission—Review by court—Tithe Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 43), s. 3, sub-s. 1; s. 4, sub-s. 2; s. 39, sub-s. 3.*

The Tithe Redemption Commission, in exercise of their functions under the Tithe Act, 1936, determined that an annuity was charged under s. 3, sub-s. 1, of the Act in respect of certain land which was in the ownership of two persons, and they duly apportioned the annuity. The defendant, who was the owner of part of the land, contended that no tithe rentcharge now represented by the annuity, ever issued out of his land, and that, therefore, no annuity, or apportioned annuity, could be charged in respect of it. In an action against the defendant to recover a half-year's instalment of the apportioned annuity :—

Held, that, under s. 39, sub-s. 3, of the Act, the determination of the commission that tithe rentcharge issued out of the land at the relevant date was binding and conclusive for all purposes, it being made in relation to a matter which they were authorized by the Act to determine.

Bunbury v. Fuller (1853) 9 Ex. 111 distinguished.

APPEAL from Cassels J.

The plaintiffs were the Tithe Redemption Commission established by s. 4, sub-s. 1, of the Tithe Act, 1936. The defendant, John Henry Wynne, was the owner of a piece of woodland, which physically formed part of a wood of some twenty acres in extent, situated in the tithe district of Llanynys in the county of Denbigh. This piece of woodland adjoined a cultivated field and up to the year of 1919 both had been in the same ownership. In that year the property was sold and the defendant purchased the piece of woodland and the field was purchased by one T. H. Parry: and by the conditions of sale the field was sold subject to the tithe rentcharge of *1l. 15s.*, and the woodland free of any rentcharge. On March 13, 1940, the plaintiffs, in exercise of their functions under the Tithe Act, 1936, determined that an annuity of *1l. 12s. 1d.* (representing the tithe rentcharge of *1l. 15s.*) was chargeable under s. 3, sub-s. 1, of the Act in respect of the whole area comprising the piece of woodland and the field, as constituting one tithe area, and in pursuance of s. 10 they apportioned that amount between the woodland and the field and ordered that the amount of *3s. 2d.* should be apportioned to the woodland. The defendant, contending that no woodland

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in the parish had ever been subject to tithe rentcharge and that the area on which the charge of *1l. 15s.* had been imposed comprised the cultivated field only, and not the piece of woodland, refused to pay this sum and the plaintiffs brought proceedings in the county court to recover three half-yearly instalments from him. The case in the county court was conducted on the footing that the question whether tithe rentcharge had ever issued out of the defendant's land was one for the court to decide and the county court having heard evidence on the point decided that it had not and gave judgment for the defendant. The plaintiffs thereupon brought this action formally claiming a subsequent half-yearly instalment of *1s. 7d.*, and a declaration that their determination that a redemption annuity of *1l. 12s. 1d.* was charged in respect of the tithe area and the apportionment of the said annuity were final and conclusive and binding on the defendant.

Cassels J. gave judgment for the defendant, holding that the Tithe Redemption Commission, as a court of limited jurisdiction, could not give itself jurisdiction by a wrong decision on a point collateral to the merits of the case on which the limits to its jurisdiction depended: *Bunbury v. Fuller* (1). It was said that the commission had given an honest decision after honest consideration on the same representations as had been urged before that court, and that, therefore, the court could not go behind their decision, but it had been admitted that the apportioned area had never been "land out of which "a tithe rentcharge extinguished by [the Act of 1936] issued "immediately before the appointed day." The existence of that fact was essential to the jurisdiction of the commission to deal with the matter. They had found it wrongly, and, therefore, their decision was erroneous. The plaintiffs appealed.

Sir Donald Somervell A.-G. and *Diplock* (for *Hubert Hull*, on war service) for the plaintiffs. The decision of Cassels J. was wrong. The determination of the Tithe Redemption Commission that tithe rentcharge issued out of the land belonging to the defendant immediately before the appointed day was not a decision in regard to a collateral matter which could be called in question in a court of law, but was a determination by the commission of a matter which they were authorized by the Act to determine, and under s. 39, sub-s. 3, of the Act

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such a determination was binding and conclusive for all purposes. There could not be plainer words than those in s. 4, sub-s. 2; s. 9, sub-s. 1; and s. 39, sub-s. 3, of the Act to show that the commission are to determine out of what lands tithe rentcharge issued and that their determination should be final and conclusive. The powers of the commission are not limited to the determination of the lands out of which tithe rentcharge issued. They can also determine the land on which the annuity was charged. The decision of Cassels J. makes nonsense of the Act. It is stated in the headnote to *Colonial Bank of Australasia v. Willan* (1) that matters on which the defect of jurisdiction depends may be apparent on the face of the proceedings, or may be brought before the superior court by affidavit, but they must be extrinsic to the adjudication impeached The objection of defect of jurisdiction cannot be entertained if it rests solely on the ground that the judge has erroneously found a fact which was essential to the validity of his order, but which he was competent to try. It was held in *Blackett v. Ridout* (2), that although it was not within the jurisdiction of the Inclosure Commissioners under the Inclosure Act, 1845, to determine the question of title to land, yet it was held to be within their jurisdiction to determine the question of encroachment and to decide whether an inclosure was an ancient inclosure. In the present case the Tithe Act, 1936, conferred on the commission power to determine this question, and their determination is binding and conclusive.

Sutton K.C. and *J. Jones-Roberts* for the defendant. The Act deals solely with land out of which tithe rentcharge issued immediately before the appointed day and the fact that tithe rentcharge issued out of the land was a matter which had to be decided affirmatively before the jurisdiction to charge an annuity on the land arose at all, and the commission could not give themselves jurisdiction to charge an annuity and then apportion it by a wrong decision on the preliminary point: *Bunbury v. Fuller* (3). A decision on this point by the commission, therefore, is not one of the matters rendered final and conclusive by s. 39 and it may be investigated and, if necessary, corrected by the court. It is true that the Act does not use express words to exclude land out of which tithe rentcharge did not issue from the jurisdiction of the

(1) (1874) L. R. 5 P. C. 417,
see p. 443.

(2) [1915] 2 K. B. 415, 423.

(3) (1853) 9 Ex. 111.

commission, but it does so by necessary implication. Otherwise they would have power to charge an annuity on land which had been exempted from tithe rentcharge by statute or in respect of which the charge had been redeemed, and the landowner would be without redress. As regards the apportionment, s. 10 was intended to deal with cases where the owner of part of the land in divided ownership had a legal right to recover contribution from the owner or owners of the remainder, but here no such right belonged to the owner of the field against the defendant. It was to deal with such a position that the proviso to sub-s. 1 of that section was inserted, and the commission have paid no regard to the fact that the field was sold and bought subject to the whole of the rentcharge of 1*l.* 15*s.*

[GODDARD L.J. The commissioners are only bound to have regard to an informal arrangement for the apportionment of tithe rentcharge; they are not directed to give effect to such an arrangement; they are entitled to disregard it. It is only one of the things which they may take into account.]

SCOTT L.J. This appeal raises an important question of the interpretation of the Tithe Act, 1936, which was intituled: "An Act to extinguish tithe rentcharge and extraordinary "tithe rentcharge, and to make provision with respect to the "compensation of the owners thereof and rating authorities "and to the liabilities of the owners of land charged therewith "in respect of the extinguishment thereof." For the purposes of the Act, the Tithe Redemption Commission was constituted, with very wide powers for dealing in their discretion with the matters covered by the title of the Act. I have recited the title because, if there be any ambiguity in the language of the sections which we have to construe, the title is important as throwing light on them. We are all familiar with the advantages of having a special court, often called a commission, to deal with the various complicated subjects involving much detail which may arise in carrying out the Act of Parliament under which the commission is given jurisdiction. The work of such a commission is usually partly executive and partly judicial. The question raised in the present proceedings is concerned with the jurisdiction of the Tithe Redemption Commission. It is whether an apportionment of the statutory annuity which the Act authorizes the commission to apportion by way of imposing liability on those who had previously been

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liable to tithe rentcharge, is a valid apportionment. For that purpose the commission are, in my view, given a very wide jurisdiction.

The determination of the question before us involves a careful consideration of the provisions of the Act. Section 1 provides that on October 2, 1936, the "appointed day," all tithe rentcharge shall be extinguished, and thereafter the land out of which any tithe rentcharge issued immediately before that day is to be absolutely discharged and freed therefrom. Section 2, sub-s. 1, provides that, subject to the provisions of the Act, stock to be called "redemption stock" will be paid to the owners of tithe rentcharge by way of compensation, and sub-s. 3 of that section provides that for the purposes of the Act "the gross annual value of a rentcharge" shall be taken to be the amount which bears to the amount of "the rentcharge" a certain percentage proportion. By s. 3, sub-s. 1, "Subject to the provisions of this Act, an annuity "to be called a 'redemption annuity' shall be charged in "respect of the land out of which a tithe rentcharge extinguished "by this Act issued immediately before the appointed day." That is to continue for sixty years. By s. 3, sub-s. 2: "The "amount of an annuity charged by this section in respect of "the land out of which a rentcharge issued shall be the amount "which bears to the amount of the rentcharge" a certain relation. Section 4, which creates the commission, says: "There shall be established for the purposes of this Act a "commission to be called the 'Tithe Redemption Commission' ". . . . consisting of a chairman and not more than four "other commissioners." Sub-section 2 prescribes the jurisdiction of the commission: "It shall be the duty of the "commission, subject to and in accordance with the provisions of this Act—(a) to determine what tithe rentcharges "have been extinguished by this Act," and "(b) to determine "what annuities are charged by s. 3 of this Act, and to "record particulars thereof, to apportion annuities which "are charged in respect of land in the ownership of two "or more owners, and to manage annuities." Section 5, sub-s. 1, provides that there shall be transmitted to the commission in respect of every tithe rentcharge extinguished by the Act particulars in writing so far as they are relevant to the matters in question. Section 9, sub-s. 1, which deals with the annuities created in place of the tithe rentcharge, provides: "As soon as may be after the appointed day, the

“commission shall determine in relation to every district the
 “amount of each annuity charged in respect of land in the
 “district and the land in respect of which each such annuity
 “is charged, and shall prepare a register specifying the amount
 “of each such annuity and indicating by reference to a map
 “the land in respect of which it is charged, and, after giving
 “to the owners of land in the district an opportunity of
 “inspecting the register and map and after making any
 “amendments therein which in accordance with information
 “furnished to them by such owners or otherwise in their
 “possession appear to them to be requisite, shall seal two copies
 “thereof, one of which shall be deposited at the principal
 “office of the commission and the other shall be deposited at
 “such place in, or in the neighbourhood of, the district, as the
 “commission may direct.” By sub-s. 2: “Where under the
 “subsequent provisions of this Act an annuity charged in
 “respect of land in a district in respect of which an annuities
 “register has been sealed is extinguished or reduced in amount,
 “or a substituted annuity is charged in respect of land in such
 “a district ” an entry is to be made accordingly. By sub-s. 3 :
 “Entries relating to an annuity in an annuities register shall
 “be conclusive evidence that an annuity of the amount therein
 “specified was charged in respect of the land therein indicated,
 “as delineated in the annuities map,” on certain dates which
 “are mentioned. By sub-s. 4: “If it is shown to the satis-
 “faction of the commission that any error exists in an annuities
 “register or map, they shall forthwith amend it in such manner
 “as appears to them to be requisite.” It is to be observed that
 “all through that section complete discretion is given to the
 “commission. I refer to s. 10, sub-s. 1, simply to show that it
 “carries out the intention of Parliament to confer on the com-
 “mission that wide discretion: “Subject to the provisions of this
 “Act, the commission shall, in every case in which they ascertain
 “that an annuity is charged in respect of land in the ownership
 “of two or more owners, apportion the annuity as between
 “the several parts of the land that are in different ownership
 “in such manner as appears to the commission to be just and
 “equitable; Provided that in making any such apportionment
 “they shall have regard ” to various matters which are there
 “indicated. By sub-s. 2: “When the commission have
 “apportioned an annuity, they shall make an order specifying
 “the amount apportioned to each part of the land”
 The last section to which I need refer is s. 39. Sub-section 1

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C. A. applies certain provisions of the Arbitration Acts to the
 1943 working of the commission. By sub-s. 2: "Before making a
 ———— "determination in relation to any matter which they are
 TITHE "authorized by this Act to determine, the commission . . .
 REDEMPTION "shall give to any person who satisfies them that he is interested
 COMMISS- "in the land or in the compensation to be made in respect of
 SION "the tithe rentcharge, as the case may be, to which the deter-
 v. "mination relates, an opportunity of making representations,
 WYNNE. "and any person who satisfies the commission . . . or the
 Scott L.J. "court as the case may be, that he is so interested may apply
 "for the statement in the form of a special case of any question
 "of law arising in relation to the matter." The court there
 referred to is the court referred to in the Arbitration Acts.
 By sub-s. 3: "Subject as aforesaid, a determination of the
 "commission . . . in relation to any matter which they are
 "authorized by this Act to determine shall be binding and
 "conclusive for all purposes."

In my view, that series of sections indicates in clear language that the commission are intended by Parliament to decide all these matters on which the register, which they are directed to keep, depends. Could the commission, therefore, deal with the question whether a tithe rentcharge issued out of the land belonging to the defendant? In my opinion they clearly could do so. The commission are obliged to ascertain whether a tithe rentcharge issued out of any land with which they are dealing because, without doing so, they cannot determine the existence of an annuity or apportion an annuity in respect of that land. It is submitted by Mr. Sutton, on behalf of the defendant, that that is a collateral matter over which the Act gave the commission no jurisdiction, and the learned judge, in a judgment which, quite frankly, I do not quite follow, took the same view. In my opinion, that conclusion would defeat what must have been the purpose of Parliament in passing this legislation, namely, to create a commission properly qualified to deal with all matters necessary to the carrying out, in the most economical and efficient way possible, of the changes intended by Parliament. I confess to having much sympathy with the principle, applied by Parliament, of creating a commission for purposes comparable to this. I think that this Act is clear in its language, but, if there be any ambiguity, I am satisfied that it ought to be resolved in such a way as to make sure that the commission have power to deal with all the questions which are vital to the main decisions which

they are directed to make, namely, as to the amount of the annuity, and as to the land out of which the annuity is to be treated as issuing in substitution for the old rent-charge. In that way only are the commission able to ascertain the liabilities of the owners of the land. I do not think it necessary to refer to the case on which the learned judge mainly depended, namely, *Bunbury v. Fuller* (1), except very summarily. That was a decision under the Tithe Act, 1836, the language of which is different from that of the present Act. It is really only misleading, on the construction of a statute, to cite a case which was decided on another Act which contains different language. It may well be that that decision was present to the mind of the draftsman of the Act of 1936 when he gave a wide discretion to the commission which the Act was to create. For these reasons, I think that this appeal must be allowed.

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MACKINNON L.J. I agree. It is provided in s. 39, sub-s. 1, of this Act that: "subject as aforesaid a determination of the "commission . . . in relation to any matter which they are "authorized by this Act to determine shall be binding and "conclusive for all purposes." Prima facie the determination of the commission in the present case, that the defendant is liable to pay an annuity of 1s. 7d. each half-year in substitution for tithe rentcharge in respect of the land in question was binding and conclusive for all purposes. It is, however, objected by Mr. Sutton, on behalf of the defendant, that the conclusiveness provided for by this sub-section is limited to a determination of a matter in respect of which the commission have jurisdiction to make a determination, and he argued that they had no jurisdiction wrongly to determine that immediately before the appointed day a tithe rentcharge extinguished by the Act issued out of the defendant's land and so give themselves power to decide that a redemption annuity should be charged in respect of the land. Obviously, in one sense, that begs the question. The commission are charged with the duty of determining what land was subject on the appointed day to tithe rentcharge, and the fallacy of the objection is clearly shown in *Colonial Bank of Australasia v. Willan* (2), where the position is thus summed up in the headnote: "Matters on which the defect of jurisdiction depends may be "apparent on the face of the proceedings, or may be brought

(1) 9 Ex. 111.

(2) L. R. 5 P. C. 417.

C. A. "before the superior court by affidavit, but they must be
 1943 "extrinsic to the adjudication impeached." The matter on
 ——— which the defect of jurisdiction in the present case is said to
 TITHE depend is not extrinsic to the adjudication impugned. It is
 REDEMPTION the very matter on which the commission have to adjudicate.
 COMMISSION That is referred to in the next passage but one in the headnote :
 SION
 v. "The objection of defect of jurisdiction cannot be entertained
 WYNNE. "if it rests solely on the ground that the judge has erroneously
 ———
 MacKinnon L.J. "found a fact which was essential to the validity of his order,
 "but which he was competent to try." That is taken from
 the opinion of the Board delivered by Sir James Colville,
 and the material sentence in regard to that is as follows (1) :
 "But an objection that the judge has erroneously found a
 "fact which, though essential to the validity of his order,
 "he was competent to try, assumes that, having general
 "jurisdiction over the subject-matter, he properly entered
 "upon the inquiry, but miscarried in the course of it." That
 is the utmost that can be said in this case. The commission
 had jurisdiction to try whether this land was subject to a
 rentcharge, and, therefore, they rightly entered on that
 inquiry. To say that they made a mistake in finding that it
 was so subject is merely to say that they made a mistake in
 the course of carrying out their duty, and it is vain to attempt
 to rely on that circumstance to support the argument that the
 commission had no jurisdiction to find that which they found,
 their finding, under s. 39 of the Act, being conclusive for all
 purposes. I think that the learned judge was wrong.

GODDARD L.J. I agree. The present case is materially
 different from *Bunbury v. Fuller* (2), on which the learned
 judge relied, because here, as MacKinnon L.J. has pointed
 out, the very point that the commission had to decide was
 what was the land in respect of which the annuity was to
 be charged. In *Bunbury v. Fuller* (2), by s. 45 of the Tithe
 Act, 1836, the commissioners were given jurisdiction to hear
 and determine disputes as to tithes, and their decision was
 final and conclusive. By s. 90 certain tithes were withdrawn
 from the jurisdiction of the commissioners altogether. In
 those circumstances, no doubt, if, when a case came before
 the commissioners, it was objected that the tithe in question
 had been withdrawn from the jurisdiction of the commissioners
 under s. 90, the commissioners would have to decide whether

(1) L. R. 5 P. C. 443.

(2) 9 EX. 111.

or not they could proceed with the case, but their decision on that question would not be final. It could be tested in the courts. Here, however, I do not find that there is any preliminary question to be tried. The matter to be decided by the commission was what was the land in respect of which this annuity was charged, and once the commission have given a decision on that question, that decision cannot be challenged.

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Appeal allowed.

Solicitor for plaintiffs: *Official Solicitor, Tithe Redemption Commission.*

Solicitors for defendant: *Wigan & Co., for Kerfoot, Owen & Wearn, Denbigh.*

R. F. S.

END OF VOL. AND OF KING'S BENCH SERIES FOR 1943.

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7. — — — *Taking possession of property* — *Re-entry upon land* — *Service tenancy* — *Termination of employment and tenancy* — *Tenant holding over* — *Eviction by employers* — *Need of leave of appropriate court* — *Courts (Emergency Powers) Act, 1939 (2 & 3 Geo. 6, c. 67), s. 1, sub-s. 2 (a) (ii), (iii).*

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8. — — — *False imprisonment* — *Detention under Defence (General) Regulations, 1939, reg. 18B (1A)* — *Ground of detention wrongly stated in copy of order served on person detained* — *Habeas corpus* — *Res judicata.* See BUDD v. ANDERSON, sub tit. FALSE IMPRISONMENT.

9. — — — *Food Control* — *Rationing* — *Butter* — *Maximum prices* — *Butter (Maximum Prices) (No. 2) Order, 1940 (St. R. & O., 1940, No. 773), sch. (as amended by St. R. & O., 1941, No. 666, art. 1 (c)).*

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10. — — — *Lighting restrictions* — *Causing light to be displayed in "black-out"* — *Negligence of defendant's servant* — *Absence of knowledge and exercise of due diligence by defendant* — *Availability of defence* — *Defence (General) Regulations, 1939 (St. R. & O., 1939, No. 927), reg. 24 (2B)* — *Lighting (Restrictions) Order, 1940 (St. R. & O., 1940, No. 74), paras. 1 (a), 52 (4).*

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11. — — — *Pedal bicycle* — *Number of lights to be displayed* — *Lighting (Restrictions) Order, 1940 (St. R. & O., 1940, No. 74), para. 31 (1.).*

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12. — Offence against Defence Regulations — Penalties increased by later Order in Council — Applicability of increased penalty to offence already complete — Onus of proof — Exception to general provision — Registration under Limitation of Supplies Orders — Defence (General) Regulations, 1939 (St. R. & O., 1939, No. 927), regs. 55, 92 — St. R. & O., 1942, No. 501, para. 1 (ID).

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13. — War damage — Application by landlord to determine validity of notice of disclaimer — Subsequent applications by tenant to determine fitness of premises — Matters of unfitness open to tenant — Scope of implied statutory covenant — Amalgamation of premises held under separate leases — Landlord and Tenant (War Damage) Act, 1939 (2 & 3 Geo. 6, c. 72), s. 6, sub-s. 1; s. 11, sub-s. 1 (a) — Landlord and Tenant (War Damage) (Amendment) Act, 1941 (4 & 5 Geo. 6, c. 41), s. 14.

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15. — Ground lease — Notice of retention — Reduced rent — Date from which reduction should operate — County court — Application by lessors for determination whether lessees should be allowed to exercise right of retention of lease as multiple lease — Alternative application to court to fix period in respect of which reduced rent payable as under ground lease — Withdrawal by lessors of first application — Duty of county court judge — Landlord and Tenant (War Damage) Act, 1939 (2 & 3 Geo. 6, c. 72), s. 10, sub-s. 1 (c); s. 15 — Landlord and Tenant (War Damage) (Amendment) Act, 1941 (4 & 5 Geo. 6, c. 41), s. 2, sub-s. 5; s. 10, sub-s. 1, 2; sch. — County Court Rules, 1936-1941, Or. XV., r. 6.

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2. — Modification of Act by regulations — Circular saw — Woodworking Machinery Regulations, 1922 (St. R. & O., 1922, No. 1196), regs. 10, 21 — Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 67), s. 14, sub-s. 1.

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4. — Negligence — Master and servant — Factory — Repair of ship in wet dock — Fatal injury to workman — Liability of employers — Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 67), ss. 60, 106, 159 — Shipbuilding Regulations, 1931 (St. R. & O., 1931, No. 133), regs. 1, 10, 42. See GARCIA v. HARLAND & WOLFF, LD., sub tit. NEGLIGENCE.

FALSE IMPRISONMENT—Emergency legislation — Detention under Defence (General) Regulations, 1939, reg. 18B (1A) — Ground of detention wrongly stated in copy of order served on person detained — Habeas corpus — Res judicata.

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2. — Sale of article to prejudice of purchaser—Proceedings against manufacturers—Purchase of sample for analysis—Division of sample—Retained part sub-divided—Portion only of sub-divided portion produced at hearing—Food and Drugs Act, 1938 (1 & 2 Geo. 6, c. 56), s. 70, sub-s. 1; s. 80, sub-s. 4; s. 83, sub-s. 3.

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2. — Pedestrian crossing places—Precedence of foot passengers over vehicular traffic—Duty of drivers of vehicles approaching crossing—Breach by driver of statutory obligation—Contributory negligence of pedestrian—Availability as defence—Reasonableness of regulations—Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, regs. 3, 4—Pedestrian Crossing Places (Traffic) Regulations, 1941 (St. R. & O., 1941, No. 397), regs. 3, 4.

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2. — Institute Time Clauses—Risk of loss by collision between insured vessel and any other ship or vessel—Collision between insured vessel and flying boat.

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2. — Juvenile court—Approved school order—Residence—Material date—Children and Young Persons Act, 1933 (23 Geo. 5, c. 12), s. 70, sub-s. 2.

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3. — Sentence—Fine—Time allowed for payment—Default—Inquiry as to means—Evidence given at previous hearing—Admissibility—Onus of proof—Money Payments (Justices Procedure) Act, 1935 (25 & 26 Geo. 5, c. 46), s. 1, sub-s. 3.

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2. — Damage by water—Tenant's shop part of landlord's building—Damage to shop from fire extinguishing apparatus in building—No negligence by landlord—Implied assent of tenant to installation.

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3. — Deduction by tenant from rent of income tax under sch. A—Failure of former tenant occupier to pay tax—Premises sublet by tenant—Arrears of tax collected from sub-tenants—Deduction of tax by sub-tenants from payments of rent to tenant—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), sch. A, No. VIII., rr. 4, 7, 9.

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4. — Lease—Assignment—Covenants by successive assignees directly with lessor to pay rent for residue of term—Failure of assignee in possession to pay rent—Liability of previous assignee for arrears.

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5. — Rent restriction — Furnished letting—"Furniture"—Fixtures—Rent and Mortgage Interest Restrictions Act, 1939 (2 & 3 Geo. 6, c. 71), s. 3, sub-s. 2 (b).

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6. — — Parsonage house—Applicability of Rent and Mortgage Interest Restrictions Acts, 1920 to 1939. See GLOUCESTER (BISHOP) v. CUNNINGTON, sub tit. ECCLESIASTICAL LAW.

7. — — Possession — Agricultural worker—Dwelling-house required for his occupation—"Work necessary for proper working of holding"—Evidence—Certificate of War Agricultural Executive Committee—Worker and work not identified—Sufficiency—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 Geo. 5, c. 32), sch. 1, para. (g) (ii.).

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8. — — Standard rent—Application to determine—Existing rent not disputed in previous proceedings—Estoppel—Increase of Rent and Mortgage Interest (Restrictions)

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9. — — "Last let"—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12, sub-s. 1 (a)—Rent and Mortgage Interest Restrictions Act, 1939 (2 & 3 Geo. 6, c. 71), s. 3, sub-s. 1; sch. 1.

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10. — — Small tenement—Recovery of possession—Warrant of justices—Stay—Action by tenant for trespass—Application to justices to approve sureties—Duty of justices—Small Tenements Recovery Act, 1838 (1 & 2 Vict. c. 74), s. 3.

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2. — Rates—Beneficial occupation by local authority—Land used for public benefit—Swimming baths, boating lake, pavilion or concert hall, accommodation for games—Lock-up shops—Substantial revenue derived from properties. See NORTH RIDING OF YORKSHIRE COUNTY VALUATION COMMITTEE v. REDCAR CORPORATION AND ANOTHER, sub tit. RATES.

3. — — Restriction of ribbon development—Claim for compensation by landowner—Material date in assessing compensation—Date of claim—Date of arbitration—Intervention of war between claim and arbitration—Right of arbitrator to consider—Restriction of Ribbon Development Act, 1935 (25 & 26 Geo. 5, c. 47), s. 9, sub-ss. 1, 4 (a).

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4. — — Tramway—Abandonment of track by undertakers—Assumption by highway authority of work of removing track and making good surface of road—Delay in executing work—Accident to cyclist—Liability of authority—London Passenger Transport Act, 1933 (23 Geo. 5, c. 14), s. 23.

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3. — Negligence—Certified scheme under Workmen's Compensation Acts — Exercise by workman of option to proceed independently of Acts—Provision in scheme that compensation in claim under Employers' Liability Act, 1880, or at common law, to be that provided by scheme — Validity — Scope of scheme — Action by widow of workman under Fatal Accidents Acts and Employers' Liability Act, 1880 — Liability of employers. See COE v. L. & N.E. RY., sub tit. NEGLIGENCE.

4. — — Factory—Repair of ship in wet dock—Fatal injury to workman — Liability of employers. See GARCIA v. HARLAND & WOLFF, LD., sub tit. NEGLIGENCE.

5. — — System of working—Loading of ship—Use of "married gear"—Common employment. See SPEED v. THOMAS SWIFT & Co., sub tit. NEGLIGENCE.

6. — Wages—"Standing by" in case of emergency.

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2. — Joint tortfeasors — Apportionment of damages and costs—Revision by Court of Appeal.

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3. — Master and servant — Certified scheme under Workmen's Compensation Acts — Exercise by workman of option to proceed independently of Acts—Provision in scheme that compensation in claim under Employers' Liability Act, 1880, or at common law, to be that provided by scheme—Validity—Scope of scheme—Action by widow of workman under Fatal Accidents Acts and Employers' Liability Act, 1880—Liability of employers—Workmen's Compensation Act, 1925 (15 & 16 Geo. 5, c. 84), s. 29, sub-s. 1; s. 31, sub-s. 1.

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4. — — Factory — Repair of ship in wet dock—Fatal injury to workman—Liability of employers—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 67), ss. 60, 106, 159—Shipbuilding Regulations, 1931 (St. R. & O., 1931, No. 133), regs. 1, 10, 42.

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5. — — System of working — Loading of ship—Use of "married gear"—Common employment.

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6. ——— Pedestrian crossing places —
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2. ——— Payment into court—Denial of
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3. ——— Pleading — Particulars — In-
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4. ——— Setting aside order—Inherent
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5. ——— Third party—Insurance company—
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2. ——— Negligence — Branch line —
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2. — Recovery from owner of hereditament — "Person entitled to receive rent"—Right to recover from owner's agent—Middlesex County Council (General Powers) Act, 1938 (1 & 2 Geo. 6, c. xcix.), s. 118, sub-ss. 1, 2.

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3. — Reduction of payment—Poverty of ratepayer—Damage to premises through enemy action—Resolution of rating authority to deal with damaged premises in uniform manner regardless of ratepayer's means — Rating and Valuation Act, 1925 (15 & 16 Geo. 5, c. 90), s. 2, sub-s. 4.

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